Supreme Court, U.S.
FILED
MAY 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-2077

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERM 1988

PETER M. STERN,
Petitioner

V.

HONORABLE ROBERT N.C. NIX, JR., INDIVIDUALLY AND AS CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA, HONORABLE ROLF LARSEN, HONORABLE JOHN P. FLAHERTY, HONORABLE JAMES T. McDERMOTT, HONORABLE WILLIAM D. HUTCHINSON, HONORABLE STEPHEN A. ZAPPALA and HONORABLE NICHOLAS P. PAPADAKOS, INDIVIDUALLY AND AS JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA,
Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

Arthur W. Lefco, Esquire
Alan C. Milstein, Esquire
MESIROV, GELMAN, JAFFE, CRAMER & JAMIESON
15th Floor,
The Fidelity Building
Philadelphia, PA 19109
(215) 893-5000
Attorneys for Petitioner

STATEMENT OF QUESTION PRESENTED

1. Whether the federal district courts have the power to hear a generalized constitutional attack by a disbarred attorney, on behalf of himself and others similarly situated, on the rules by which the Supreme Court of Pennsylvania disbarred him?

2. Whether state court rules may constitutionally allow a state supreme court to reverse a crucial finding of material fact and credibility by the only tribunal which heard the evidence and, on the basis of that reversal, to disbar an attorney, where such rules make no provision for an evidentiary hearing before the state supreme court?

TABLE OF CONTENTS

	PAGE
STATEMENT OF QUESTION PRESENTED. .	i
TABLE OF AUTHORITIES	iii
REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS.	vii
STATEMENT OF JURISDICTION.	viii
STATEMENT OF FACTS	1
ARGUMENT	18
CONCLUSION	51

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.	A-1
OPINION OF THE UNITED STATES DISTRICT COURT.	A-28
OPINION OF SUPREME COURT OF PENNSYLVANIA IN *IN RE STERN* . . .	A-33

TABLE OF AUTHORITIES

	PAGE(S)
Brennan v. Grisso, 198 F.2d 532 (D.C. Cir. 1952).	39
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	15, 16, 17, 18, 20, 21, 24, 25, 26, 30, 50
Ex parte Secombe, 60 U.S. 9, 15 L.Ed. 565 (1856)	33, 36
Gershenfeld v. The Justices of the Supreme Court of Pennsylvania, 641 F.Supp. 1419 (E.D.Pa. 1986)	25
Holiday v. Johnston, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941)	40
Howell v. State Bar of Texas, 710 F.2d 1075 (5th Cir. 1983)	24, 25
Laurie v. Golden Hersh, 716 F.2d 401 (7th Cir. 1981)	25
Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980) .	44, 49

PAGES

Mattas v. Supreme Court of Pennsylvania, 576 F.Supp. 1178 (W.D.Pa. 1983) . . . 25, 26, 35

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). . . . 42, 44, 47

In Re Ming, 469 F.2d 1352 (7th Cir. 1972) 35

In Re Ruffalo, 390 U.S. 544 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968). 33

Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936) 36

N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). 33, 35

Queen v. Bertrand, 16 Eng. Rep. 391 (1867) (quoted with approval in United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)). 37

Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984) 25, 29, 30, 31, 45, 47 48, 49

Rogers v. Supreme Court of Pennsylvania, 641 F. Supp. 1419 (E.D. Pa. 1986) 25, 26, 50

PAGES

Schwiser v. Brady, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978) 40

Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 575 (1967). 33

Stern v. Nix, 840 F.2d 208 (3d Cir. 1988). 19

Toffano v. Supreme Court of Nevada, 718 F.2d 313 (9th Cir. 1983) 25

United States ex. rel. Graham v. Mancusi, 457 F.2d 463 (2d Cir. 1972). 39

United States v. Nugent, 100 F.2d 215 (6th Cir. 1938), cert denied, 306 U.S. 648, 59 S.Ct. 591, 83 L.Ed. 1046 (1939) . 39

United States v. Oregon Medical Society, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952). . 38

United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). 37, 41, 42, 47, 48, 49

PAGES

STATUTES

Federal Magistrates Act,
28 U.S.C. §636, et seq. 41

RULES

F.R.Civ.P. 52(a), 53(e)(2) 38

Pa.R.D.E. 205. 5

Pa.R.D.E. 207. 5

Pa.R.D.E. 208. . . . . 5, 6, 7, 41

REFERENCE TO OFFICIAL and UNOFFICIAL REPORTS

The Opinion of The Third Circuit in this matter is reported at 840 F.2d 208 (3d Cir. 1988). The District Court Opinion, included in the Appendix infra, is unreported. The Opinion of the Supreme Court of Pennsylvania disbarring Stern is reported at 515 Pa. 68, 526 A.2d 1180 (1987).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked by virtue of 28 U.S.C. §1254 and by Supreme Court Rule 17. Petitioner seeks review of an order of The Third Circuit dated February 29, 1988.

STATEMENT OF FACTS

A. BACKGROUND

Peter M. Stern ("Stern") was admitted to the Bar of the Supreme Court of Pennsylvania on November 21, 1966. In 1980, officers of a client of Stern's pressured him to deliver to William O'Farrell, the head of the union representing the client's employees, the sum of $5,000, as a gift without strings, and Stern eventually did so. In delivering the funds, both Stern and his client knew that the funds would not influence O'Farrell in any way and considered the money a gift and not a bribe; O'Farrell made it clear that the funds would not influence him and considered it merely a gift.

In early 1982, the FBI began an investigation of bribes extorted by

O'Farrell. An FBI agent, as an aside to other business, mentioned to a then partner of Stern that it had been suggested that Stern had delivered funds to O'Farrell. The FBI had no usable evidence to sustain the allegation. Nevertheless, upon inquiry by federal agents, without requesting immunity, Stern readily discussed his contacts with O'Farrell including his delivery of the $5,000 gift at meetings attended by attorneys with the United States Attorneys Office and agents of the FBI. The government, however, could not and would not have prosecuted Stern because it had no usable evidence that the transaction had occurred, and because it considered the offense to be merely a violation of the anti-gratuity provisions of the Taft-Hartley Act and not a bribe. Moreover, if the government had brought

an indictment, Stern knew he could have invoked his Fifth Amendment privilege (for which he could not suffer attorney discipline as a matter of constitutional law) and prevailed. Nonetheless, Stern forthrightly cooperated with the federal authorities.

On December 22, 1983, the Justice Department informed the Pennsylvania Disciplinary Board of Stern's statements and, on January 14, 1985, Disciplinary Counsel filed a petition for discipline, charging that Stern violated DR1-102(A)(3), (4) and (6) and DR7-102(A)(7).[1/]

1/ DR1-102(A) provides:

> A lawyer shall not:
>
> (1) Engage in illegal conduct involving moral turpitude.
>
> (2) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. THE PENNSYLVANIA DISCIPLINARY PROCESS

Pursuant to the Pennsylvania Rules of Disciplinary Enforcement ("Pa.R.D.E."), matters of discipline relating to attorneys admitted to practice in Pennsylvania are subject to action by the Disciplinary Board of the Supreme Court of Pennsylvania ("Disciplinary Board"), with final action being taken by the Supreme Court. The Pennsylvania Supreme Court appoints the members of the

---

(contd.)

> (3) Engage in any other conduct that adversely reflects on the protective of law.

DR7-102(A) provides:

> In his representation of a client, a lawyer shall not:
>
> . . . . .
>
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Disciplinary Board. The members of the Disciplinary Board, in turn, appoint various hearing committees, which are empowered to conduct hearings on discipline-related matters, and to submit a report to the Disciplinary Board containing findings and recommendations. The hearing committees are the only bodies in the Pennsylvania disciplinary system which actually hear the witnesses and preside over the admission of evidence. Pa.R.D.E. 205, 208. The Disciplinary Board also appoints a Chief Disciplinary Counsel, and assistant disciplinary counsel and staff, whose power it is to investigate attorneys involving in alleged misconduct. Pa.R.D.E. 205, 207. At the conclusion of an investigation, Disciplinary Counsel files a petition outlining formal charges against the attorney and prosecutes the

matters before the hearing committee. Pa. R.D.E. 208(a).

The hearing committee hears the evidence and testimony presented by both the Disciplinary Counsel and the attorney, files a report containing its findings and recommendations and transmits the report with the record of the proceedings to the Disciplinary Board. Pa.R.D.E. 208(c). The Disciplinary Board reviews the hearing committee's report and the record and briefs, if any, filed by the parties with the Disciplinary Board. The members of the Disciplinary Board then prepare their own findings and recommendations which, together with the briefs of Disciplinary Counsel and the subject attorney and the entire record, are transmitted to the Pennsylvania Supreme Court. Pa.R.D.E. 208(d). In the event the Disciplinary Board recommends

that the matter should be concluded by disbarment, the attorney may submit to the Court a request to present oral argument. Pa. R.D.E. 208(e).

In the event the Disciplinary Board recommends a sanction less than disbarment, the Pennsylvania Supreme Court may, either by motion by Disciplinary Counsel or sua sponte, upon consideration of the recommendation issue a rule to show cause why the attorney should not be disbarred. If the Court issues such an order, the attorney has the right upon request to file a brief and for oral argument. The attorney, however, has no right to present testimony or other evidence to the Pennsylvania Supreme Court before it takes action contrary to the recommendation of the hearing committee. Pa. R.D.E. 208(e).

In determining whether an attorney should be disbarred, notwithstanding the absence of such a recommendation by the hearing committee, the Disciplinary Board or Disciplinary Counsel, the Pennsylvania Supreme Court's review of attorney discipline is de novo; though it acts solely upon a review of the transcribed record, and the briefs and oral argument of Disciplinary Counsel and the subject attorney, the Court may reject the hearing committee's findings including findings on credibility and may order the attorney be disbarred.

C. THE PROCEEDINGS AGAINST STERN

After the filing of the petition for discipline, Stern and Disciplinary Counsel entered into a comprehensive stipulation of facts, including Stern's acknowledgment that he violated Disci-

plinary Rule 7-102(A)(7), which prohibits a lawyer from counseling or assisting clients in conduct the lawyer knows to be illegal or fraudulent. A hearing was held before a hearing committee on September 26, 1985, in which Stern presented mitigation and other evidence.

At the hearing, Stern presented the testimony of Robert Welsh, the Assistant U.S. Attorney who prosecuted the O'Farrell case. Welsh testified that the actions of Stern could not be characterized as a bribe because there was no expectation that the money delivered by Stern was intended for any quid pro quo. Stern testified on his own behalf and the hearing committee heard evidence about Stern's dire financial straits. At the hearing, Disciplinary Counsel stated it would recommend no sanction greater than public censure.

The hearing committee filed its report on February 27, 1986, dismissing the charges based on DR 1-102(A)(3)(4) & (6) and recommending discipline of private informal admonition or, at most, private reprimand. In reaching this conclusion, the hearing committee explicitly found that the $5,000 payment by Stern was made with neither the expectation nor intention to influence O'Farrell and is "the only blemish on the personal and professional record of an otherwise honest and honorable man, an able and competent practitioner of law."

The hearing committee also placed great weight on the fact that, but for the voluntary statement by Peter Stern to the federal authorities, "these disciplinary proceedings would have no foundation." Accordingly, the hearing committee concluded that because Stern

could have easily escaped discipline by refusing to make any statement, it could not "penalize Mr. Stern for his admission, as the first step towards rehabilitating his conduct."

On July 7, 1986, the Disciplinary Board issued its report and recommendation to the Supreme Court of Pennsylvania. After reviewing the recommendation, findings of fact and conclusions of law of the hearing committee, the record and the briefs of the respective parties, the Disciplinary Board concluded that the appropriate sanction in this matter was public censure. While it did not accept the hearing committee's recommendation of private admonition, the Disciplinary Board stated that Stern's considerable and compelling evidence in mitigation

"may appropriately shield him from suspension."

On October 9, 1986, the Supreme Court of Pennsylvania, without any action on the part of Disciplinary Counsel, entered a rule upon Stern to show cause why he should not be disbarred. On November 3, 1986, Stern requested an oral argument and an evidentiary hearing. Stern stated in his request for an evidentiary hearing that the hearing was necessary "so that this Court may have the same opportunity as the hearing committee to judge his demeanor, credibility, candor and contrition, as well as his fitness to practice law." On November 10, 1986, the Supreme Court of Pennsylvania granted Stern's request for oral argument but denied his request for an evidentiary hearing.

Both Stern and Disciplinary Counsel submitted briefs in response to the Rule to Show Cause. In his brief, Stern emphasized that the Supreme Court of Pennsylvania should adopt the recommendation of the hearing committee which recommended a sanction of private discipline because it was the hearing committee alone which had the opportunity to hear the evidence. Disciplinary Counsel also asked in its brief that the Court not disbar Stern. Oral argument was conducted on January 29, 1987.

On June 3, 1987, the Supreme Court of Pennsylvania issued its Opinion and Order disbarring Stern. In its Opinion, the Court emphasized that it considered the intent to influence "a crucial factor" in its discussion. With respect to that factual issue, the Court stated that it independently examined the

record and concluded that the Hearing Committee's finding with respect to Stern's intent in delivering Frankford Quaker's funds was "supported by no credible evidence." After rejecting this finding on credibility by the Hearing Committee, the Supreme Court of Pennsylvania then concluded -- solely upon the cold record before it -- that Stern's delivery of money to O'Farrell was a bribe.

In footnote 2 of the opinion, the Supreme Court of Pennsylvania acknowledged that Stern had requested an evidentiary hearing but that his request was denied because this was a "procedure for which the rules of Disciplinary Enforcement make no provision."

D. STATEMENT OF THE CASE

On June 17, 1987, Stern filed this action in the United States District Court for the Eastern District of Pennsylvania. The gravamen of Stern's Complaint was that the rules and procedures promulgated by the Supreme Court of Pennsylvania violated Stern's right to due process in that the rules fail to provide for an evidentiary hearing before the Court while they permit the Court to reject both the hearing committee's findings of material fact and credibility as well as its recommendation of a sanction less than disbarment.

The Supreme Court of Pennsylvania moved to dismiss the Complaint arguing, inter alia, that the federal courts had no jurisdiction under District of Columbia Court of Appeals v.

Feldman, 460 U.S. 462 (1983). The district court denied the motion.

After a nonevidentiary hearing before the Honorable Marvin Katz, Judge Katz denied Stern's motion for preliminary injunction on the grounds that Stern had not shown a reasonable likelihood of success on the merits. Thereafter, on August 14, 1987, Judge Katz issued an Order and Opinion holding that the Pennsylvania Supreme Court did not violate Stern's rights to due process of law.

Stern timely filed an appeal to the United States Court of Appeals for the Third Circuit. After all of the judges of the Third Circuit had recused themselves, by Order of the Chief Justice a panel from the Court of Appeals for the Second Circuit then sat as the Court of Appeals for the Third Circuit by designa-

tion. In reviewing the facts, the Court of Appeals agreed with Stern that the hearing committee, which had heard the evidence, concluded that neither Stern nor his client intended the money as a bribe, and that the Supreme Court of Pennsylvania, upon review of the cold record and after denying Stern the opportunity for an evidentiary hearing before it, rejected this finding and found the payment was a bribe, on the basis of which it disbarred Stern.

The Court of Appeals concluded, however, that Stern was seeking by this action to reverse the Supreme Court of Pennsylvania's decision to disbar him. On that basis, the Court of Appeals held that the federal courts had no jurisdiction under this Court's ruling in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

ARGUMENT

Federal Courts Have Subject Matter Jurisdiction Over This Matter Which Asserts A Generalized Challenge To The Disciplinary Rules Of The Commonwealth Of Pennsylvania.

The issues presented by this case deserve review on a writ of certiorari under the criteria set forth in Rule 17.1 (a,c), Rules of the Supreme Court of the United States. The decision of the Court of Appeals conflicts directly with other courts of appeals on the same issue, and conflicts directly with the Court's decision in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

The Court of Appeals held that the federal courts lacked jurisdiction over Stern's general constitutional challenge to provisions of the Pennsylvania Rules of Disciplinary

Procedure under which he was disbarred, on the basis that his claim really addressed his own disbarment and was therefore merely a disguised attempt to obtain federal review of the final judgment of a state court. The court stated that, despite Stern's "skillful attempt to mask the true purpose of the action," and despite his "genuflecting to the Rooker-Feldman doctrine," it was convinced that Stern sought essentially to reverse the judicial decision of the Pennsylvania Supreme Court. Stern v. Nix, 840 F.2d. 208, 212 (3d Cir. 1988). Besides requesting a permanent injunction, the court found that Stern's "veneer ... became increasingly thin" because he requested a preliminary injunction and because the headings in his appellate briefs referred to him and

not to other attorneys similarly situated. Id. at 212-13.

The application of this Court's decision in Feldman does not depend on genuflection, the thickness of one's veneer, or the phrasing of headings in appellate briefs. Moreover, Stern's right to have a federal court adjudicate his constitutional claims does not depend on whether he requested an injunction; the availability of that remedy, or its denial, cannot determine whether there is jurisdiction to address the underlying federal claim.

On the contrary, Feldman teaches that it is the essence of the claim which controls jurisdiction. Under the lower court's drawing of the Feldman line, it is likely that Mr. Feldman himself would have been denied access to the federal courts. The lower court's decision is

flatly at variance with Feldman, and review should be granted to prevent other federal courts from relying on the Court of Appeals' misapprehension.

In Feldman, this Court expressly recognized federal district court jurisdiction in cases such as this one. Feldman had been denied admission to the District of Columbia Bar, which had refused to waive the requirement of law school graduation. Feldman claimed this refusal violated his constitutional rights in five respects. Two of the five allegations asked the federal district court to review not simply the challenged bar admission rules but the District of Columbia Court of Appeals application of those rules to Feldman. Feldman claimed that the District of Columbia Court of Appeals had applied these rules in an arbitrary, capricious and discriminatory

manner. This Court concluded that the district court had no subject matter jurisdiction over these two claims which were "inextricably intertwined" with the state court's decision denying admission to the bar and, thus, required the Court "to review a final judicial decision of [a jurisdiction's] highest court . . . in a particular case." Id. at 482, 486.

Upon review of the remaining three allegations in Feldman's Complaint, however, this Court held that these were subject to federal subject matter jurisdiction. In these claims, Feldman had contended not that the rule was applied unconstitutionally, but that the rule itself was unconstitutional. Because these claims "involve[d] a general attack on the constitutionality of [the state rule]," this Court held that subject

matter jurisdiction existed. Id. at 487.

This Court reasoned:

> We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. . . . Challenges to the constitutionality of state bar rules, therefore, do not necessarily require a United States District Court to review a final state-court judgment in a judicial proceeding. Instead, the District Court may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding. If this is the case, the District Court is not reviewing a state-court judicial decision. In this regard, 28 U.S.C. §1257 does not act as a bar to the District Court's consideration of the case and because the proceedings giving rise to the rule are nonjudicial the policies prohibiting United States District Court review of final state-court judgments are not implicated. United States District Courts, therefore, have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final

> state-court judgment in a particular case.

Id. at 485-86.

Similarly, in Howell v. State Bar of Texas, 710 F.2d 1075 (5th Cir. 1983) ("Howell II"), an attorney disbarred in a judicial decision by the Texas Supreme Court brought a civil rights action seeking injunctive and declaratory relief. In two of the claims, the disbarred attorney sought direct review by the district court of the state court judgment; a third claim, however, asserted a generalized challenge that the state disciplinary rules violated the due process and equal protection clauses of the 14th Amendment. Upon remand to the Court of Appeals for consideration in light of Feldman, the Fifth Circuit held that while the two claims seeking direct review were "inextricably intertwined" with the state court's decision, the

generalized claim was not since it required review not of the Supreme Court's decision but of the disciplinary scheme itself. 710 F.2d at 1077.

Accordingly, since Feldman and Howell II, in a body of case law directly at odds with the Court of Appeals' view in this case, federal courts have not hesitated to assert subject matter jurisdiction over such generalized challenges to state disciplinary and bar rules. See, e.g., Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984); Toffano v. Supreme Court of Nevada, 718 F.2d 313 (9th Cir. 1983); Laurie v. Golden Hersh, 716 F.2d 401 (7th Cir. 1983); Gershenfeld v. The Justices of the Supreme Court of Pennsylvania, 641 F. Supp. 1419 (E.D. Pa. 1986); Rogers v. Supreme Court of Virginia, 590 F. Supp. 102 (E.D. Pa. 1984); Mattas

v. Supreme Court of Pennsylvania, 576 F. Supp. 1178 (W.D. Pa. 1983). Thus, the Court of Appeal's erroneous interpretation in this case is an anomaly which should be corrected to harmonize the law developing in the circuits.

Indeed, as the court stated in Rogers, supra:

> The point of Feldman is that no state supreme court, in its administrative or legislative capacity, may promulgate regulations, adopt policies or authorize practices which, in and of themselves, violate the constitution.

590 F. Supp. at 106.

The Court of Appeals in this case declined jurisdiction concluding that Stern had sought review of a final judgment of the Supreme Court of Pennsylvania. Because no evidentiary hearing was held before the district court, the Court of Appeals based this conclusion solely on the Complaint and

briefs filed by Stern, placing considerable weight on the fact that Stern was seeking not simply declaratory relief but injunctive relief.

Stern, however, did not ask the federal courts to engage in a review of the Pennsylvania Supreme Court's decision disbarring him. A review of the Complaint Stern filed in this matter can yield no other conclusion. As Stern stated in the introduction to the Complaint:

> The purpose of this action . . . is not to seek direct review of the action of the Justices of the Supreme Court of Pennsylvania but rather to assert a generalized challenge to the constitutionality of these rules and procedures. (18a)

Moreover, Stern did not seek an injunction from being disbarred; indeed, that had already occurred. In addition to seeking a declaration that the

Pennsylvania Supreme Court's rules were unconstitutional, Stern requested injunctive relief only to the extent of restraining the Supreme Court of Pennsylvania from disbarring him and other similarly situated attorneys unless and until it affords the right to an evidentiary hearing where the Supreme Court of Pennsylvania rejects findings of material fact and credibility of the hearing committee and issues an order of disbarment contrary to the hearing committee's recommendation.

As Stern explained in his brief and in oral argument to the Court of Appeals, Stern was not asking and could not ask the district court to sit as an appellate court to review the findings and conclusions of the Supreme Court of Pennsylvania. Instead, Stern asked only that the district court review the

constitutionality of the Pennsylvania disciplinary scheme which permitted the Supreme Court of Pennsylvania to reject findings of material fact and credibility of the hearing committee, to substitute its own findings on the basis of a cold record and to disbar an attorney on the basis of its substituted findings, all without affording the attorney an evidentiary hearing.

Stern's case is procedurally identical to the case of Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), a case directly at odds with the decision of the Court of Appeals. In Razatos, the plaintiff-attorney was subject to the disciplinary process of the State of Colorado. Under that process, the plaintiff was afforded an evidentiary hearing before a hearing committee which made findings of fact

based on contested credibility assessments and, on the basis thereof, made recommendations of discipline. Thereafter, the Supreme Court of Colorado, upon review of the record, adopted the findings of the hearing committee as well as its recommendation. Razatos complained that this procedure violated his right to due process in that the Colorado rules did not afford him the right to an evidentiary hearing before the Colorado Supreme Court, irrespective of whether the Court adopted or rejected the hearing committee's findings.

After reviewing the facts and holdings in Feldman, the Tenth Circuit concluded that the district court had jurisdiction over Razatos' claim. The court stated:

> In the case at bar, Razatos contends that under the Colorado rules, the Colorado Supreme Court is the final arbiter of

> fact in disciplinary proceedings. He argues from that premise that Colo.R.Civ.P.252 therefore violates the Due Process Clause because it fails to require the final arbiter of fact to observe the witnesses personally in cases where credibility is a critical factor. In order to evaluate this claim, the district court need not review the decision of the Colorado Supreme Court. It need only look at Rule 252 as promulgated, and as construed by state case law. Razatos framed his constitutional challenge in such a way as to allow district court subject matter jurisdiction. We therefore reverse the district court's decision that it lacked jurisdiction.

Id. at 1434 (emphasis supplied).

As in Razatos, Stern's Complaint is a generalized constitutional attack on the Rules of Disciplinary Enforcement which do not afford a disciplined attorney the right to an evidentiary hearing before the Pennsylvania Supreme Court; Stern's claim differs from that in Razatos only to the extent it is limited

to those cases where the Pennsylvania Supreme Court rejects the findings of the hearing committee and, on the basis thereof, disbars the attorney. Thus, Stern does not ask the federal courts to review the decision of the Pennsylvania Supreme Court in his particular case; instead, he asks only for a review of the Rules of Disciplinary Enforcement as promulgated to decide whether they comport with due process. Accordingly, the federal district court had jurisdiction over Stern's claim.

The rules promulgated by the Pennsylvania Supreme Court violate the essential guarantee of due process of law. Stern has been disbarred by the operation of those rules. It cannot be that such rules may evade review precisely because Stern has suffered disbarment under them. On the contrary,

this Court should exercise its discretion and direct the lower courts that it is their job to undertake such review, and to declare such rules unconstitutional if warranted.

THE RULES OF DISCIPLINARY ENFORCEMENT BY WHICH THE SUPREME COURT OF PENNSYLVANIA DISBARRED STERN VIOLATE THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

Since the early days of the Republic, this Court has stood guardian over the right of attorneys to practice law under constitutional standards. See, e.g., In Re Ruffalo, 390 U.S. 544 (1968); Spevack v. Klein, 385 U.S. 511 (1967); NAACP v. Button, 371 U.S. 415 (1963); Ex parte Secombe, 60 U.S. 9 (1856).

State courts have traditionally exercised virtually unlimited authority over attorneys admitted to practice

before them, unchecked even by state legislatures under the doctrine of separation of powers. Unlike civil litigants or criminal defendants, attorneys have no right to appeal from arbitrary, capricious, or simply unfair decisions of those courts affecting their very right to earn a living. This Court, and the inferior federal courts, are the only bodies which have the power to ensure that at least the rules applied to attorneys do not violate fundamental constitutional guarantees.

The importance of the power of the federal courts to ensure that the attorney disciplinary process comports with due process cannot be understated. While a state court has exclusive power to promulgate regulations and impose discipline in supervising its licensed attorneys, this power may not be exer-

cised in violation of federally protected rights. N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); In Re Ming, 469 F.2d 1352 (7th Cir. 1972); Mattas v. Supreme Court of Pennsylvania, 576 F.Supp. 1178 (W.D.Pa. 1983). As the United States District Court for the Western District of Pennsylvania stated in Mattas, supra, "even a lawyer has the right to enjoy first class citizenship." 576 F.Supp. at 1182 (quoting In Re Ming, 469 F.2d at 1354).

More than 100 years ago, the United States Supreme Court declared:

> The power [to disbar] . . . is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the

> court, as the rights and dignity of the court itself.

Ex parte Secombe, 60 U.S. 9, 13, 15 L.Ed. 565 (1856).

The risks of an erroneous deprivation if attorneys are not permitted an evidentiary hearing before The Supreme Court of Pennsylvania in circumstances where the Supreme Court on the basis of a cold record rejects a hearing committee's material findings of fact or credibility and orders disbarment, are self-evident. The procedural safeguards against such risks are among the basic tenets in American jurisprudence, succinctly described by Chief Justice Hughes as: "The one who decides must hear." Morgan v. United States, 298 U.S. 468, 481, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).

More than one hundred years ago, Lord Coleridge explained the risks of

making credibility determinations on a cold record:

> The most careful note must often fail to convey the evidence fully in some of its most important elements . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration . . . the dead body of the evidence, without its spirit, which is supplied, when given openly and orally by the ear and eye of those who receive it.

Queen v. Bertrand, 16 Eng. Rep. 391, 399 (1867) (quoted with approval in United States v. Raddatz, 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980)).

The principle that due process prohibits a court from making factual or credibility determinations on a cold record while it disregards the findings of the body which heard the evidence is reflected in a variety of contexts. For instance, the Federal Rules of Civil

Procedure provide that the findings of fact of the body which heard the evidence, whether a trial court or a master, may be reversed only when "clearly erroneous." F.R.Civ.P. 52(a), 53(e)(2). As Justice Jackson explained, these rules reflect the common understanding that:

> Face to face with living witnesses, the original trier of facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth... How can we say the judge is wrong? We never saw the witnesses.

United States v. Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

Similarly, where a trial judge either resigns or dies after the conclusion of a trial, courts have uniformly held that due process bars the successor judge from resolving factual disputes on

the basis of a cold record. See, e.g., Brennan v. Grisso, 198 F.2d 532 (D.C. Cir. 1952); United States v. Nugent, 100 F.2d 215 (6th Cir. 1938), cert denied, 306 U.S. 648, 59 S.Ct. 591, 83 L.Ed. 1046 (1939).

In United States ex. rel. Graham v. Mancusi, 457 F.2d 463 (2d Cir. 1972), Judge Friendly applied this principle to invalidate a procedure whereby a state appellate court entered a conviction for a lesser offense when reversal of the original conviction was required. Judge Friendly declared:

> Due process forbids that, when an issue of fact is presented, a man should be sent to prison without the trier of facts having seen and heard his accusers and himself, if he desires to testify, and weighing the credibility in the light of their demeanor on the stand.

Id. at 469.

In another context, this Court has held that a district judge could not rely on a review of the cold record of a hearing before a United States Commissioner in determining "crucial" facts. Holiday v. Johnston, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941). In so holding, the Court emphasized:

> One of the essential elements of the determination of crucial facts is the weighing and appraising of the testimony.

Id. at 352. As Justice Marshall explained, while the holding in Holiday was based on statutory construction, the Court's reasoning:

> ...went to the fundamental nature of the kind of factfinding on which many judicial determinations must rest.

Schwiser v. Brady, 438 U.S. 204, 230-31, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978) (dissenting opinion).

Most analogous to the issues presented here are the cases concerning the constitutionality of the procedures under the Federal Magistrates Act, 28 U.S.C. §636, et seq. The procedures set forth in this Act, and those utilized by the Pennsylvania Supreme Court in disciplinary proceedings, both provide for the referral of the matter to a hearing body (magistrate or hearing committee) before which the litigant presents testimony and other evidence. Thereafter, that hearing body issues a report and recommendation to the court which is then empowered to make a "de novo determination" of the hearing body's findings. Compare 28 U.S.C. §636(b)(1)(B)(C) and Pa.R.D.E. 208.

In United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980), this Court considered whether

a district judge, who referred a motion to a magistrate under 28 U.S.C.S. §636(b)(1), could accept the recommendations of the magistrate on a de novo determination without permitting the litigant a right to present evidence and testimony before the district court.

In Raddatz, the district court had accepted the findings of the magistrate while refusing the litigant's request to present testimony and evidence in a new hearing. Utilizing the Eldridge balancing test, this Court held that due process rights are adequately protected where the district court accepts the recommendation of the magistrate, notwithstanding that the court which acts as the ultimate decision maker has not personally seen and heard the testimony. 447 U.S. at 682. In so holding, the Court expressly reserved decision on the

question whether due process would require the right to such a hearing if the court were to reject the magistrate's findings on credibility. The Court, however, implied that it would seriously question the constitutionality of a reviewing court rejecting such credibility findings on a cold record, noting:

> Neither the statute nor its legislative history reveals any specific consideration of the situation where a district judge after reviewing the record in the process of making a de novo "determination" has doubts concerning the credibility findings of the magistrate. The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

447 U.S. at 680, n.7 (emphasis in original).

This issue left open by this Court was squarely faced by the Fifth Circuit in Louis v. Blackburn, 630 F.2d 1105 (5th Cir. 1980). In Louis, the district court rejected a magistrate's recommendation to grant a writ of habeas corpus based solely on a reading of the transcript of the hearing. The Fifth Circuit, again under an Eldridge analysis, held that the action of the district court violated fundamental rights to due process guaranteed by the Fourteenth Amendment. 630 F.2d at 1110. The court reasoned that to determine credibility of a witness the fact finder must observe that witness. This, the court stated, could be accomplished either by the district judge accepting the recommendation of the magistrate or by rejecting that recommendation after hearing additional testimony and viewing the witnesses.

Anything less, the court held, did not comport with due process.

In Razatos, supra, the Tenth Circuit addressed this issue in the context of the attorney disciplinary process. Razatos challenged the constitutionality of the disciplinary rules of the State of Colorado because they did not provide an opportunity for a de novo evidentiary hearing before the Colorado Supreme Court irrespective of whether the court adopted or rejected the hearing committee's findings of fact and its recommendations of discipline. One significant difference exists between the Colorado rules and the Pennsylvania rules which Stern attacks here. As the Tenth Circuit noted, the Colorado rules do not preclude the Supreme Court from holding a de novo evidentiary hearing. The Tenth Circuit stated:

> Although we have found no case in which the Court has chosen to hold a de novo hearing, we cannot say that the Court does not have the power to do so. This plenary power is consistent with the Court's inherent power apart from rule or statute, as well as the duty to discipline attorneys. . . . It includes the discretionary right to hold de novo hearings whenever necessary to provide due process.

Id. at 1434.

The Pennsylvania Supreme Court's rules, however, provide for no such discretionary power. As the Pennsylvania Supreme Court noted in the opinion disbarring Stern, the rules of disciplinary enforcement "make no provision" for the hearing Stern requested.

Notwithstanding that the Colorado Supreme Court could have granted Razatos an evidentiary hearing, Razatos claimed the rules were unconstitutional because he did not have the absolute right to such a hearing. The Tenth Circuit

analyzed this claim under an Eldridge analysis, using United States v. Raddatz, 447 U.S. 667 (1980) as a guide. The court considered the claim in Raddatz to be factually similar to Razatos' claim. The proceedings under attack in both cases, as well as in Stern's case, provide for the referral of the matter to a hearing body (magistrate or hearing committee) before which the litigant presents testimony and other evidence. Thereafter, that hearing body issues a report and recommendation to the court which is then empowered to make a "de novo determination" of the hearing body's findings. In both Razatos and Raddatz, the court to which the matter was referred accepted the findings of the hearing body while refusing the litigant's request to present testimony and evidence in a new

hearing. Raddatz, 447 U.S. at 682; Razatos, 746 F.2d at 1434-1436.

Based on these facts, the Tenth Circuit in Razatos concluded that, as in Raddatz, due process rights are adequately protected where the court accepts the recommendation of the hearing body, notwithstanding that the court which acts as the ultimate decision maker has not personally seen and heard the testimony. Raddatz, 447 U.S. at 682; Razatos, 746 F.2d at 1437.

Significantly, however, as in Raddatz, the court in Razatos expressly reserved decision on the question of whether due process would require the right to such a hearing if the court were to reject the hearing body's findings of material fact and credibility, as the Supreme Court of Pennsylvania did in Stern's case. Moreover, the Tenth

Circuit implied it would seriously question the constitutionality of a reviewing court rejecting such findings on a cold record, stating:

> Our decision is limited to the situation presented by this case. Here, the Colorado Supreme Court evaluated the recommended findings of fact of the Hearings Panel, found them supported by clear and convincing evidence, and adopted them. We do not reach the question whether due process would have required a de novo hearing if the Court had rejected or modified findings of fact based on contested credibility assessments. See Raddatz, 447 U.S. at 680, n.7.

Razatos v. Colorado Supreme Court, 746 F.2d at 1437.

As the Fifth Circuit in Louis squarely faced the issue left open by this Court in Raddatz, the question left open by the Tenth Circuit in Razatos must be squarely faced by the federal courts in Stern's case. Using Louis as a guide,

the federal courts should similarly conclude that the Pennsylvania Supreme Court violated Stern's right to due process when it rejected findings of material fact and credibility of the hearing committee and disbarred Stern on the basis of its substituted findings which it reached upon review of a cold record, all without affording Stern the right to an evidentiary hearing. Moreover, the federal courts have the power to make this determination and to ensure that a state's procedures respecting the bar do not violate the Constitution. As the district court said in Rogers, that was the very point of Feldman. 590 F.Supp. at 106.

CONCLUSION

For the above stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

ARTHUR W. LEFCO, ESQUIRE
ALAN C. MILSTEIN, ESQUIRE
Attorneys for Plaintiff

Of Counsel:

MESIROV, GELMAN, JAFFE,
CRAMER & JAMIESON
15th Floor, The Fidelity Building
Philadelphia, PA 19109
(215) 893-5000

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the United States Supreme Court.

6/15/88

Alan C. Milstein, Esquire

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 1988, copies of the foregoing Petition were served by hand delivery on all interested parties, listed below.

Alan C. Milstein, Esquire

INTERESTED PARTIES:

Howland W. Abramson, Esquire
1515 Market Street
Suite 1414
Philadelphia, PA 19102

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1519

PETER M. STERN,
Appellant

v.

HONORABLE ROBERT N.C. NIX, JR,, Individually, and as Chief Justice of the Supreme Court of Pennsylvania; HONORABLE ROLF LARSON, Individually, and as Justice of the Supreme Court of Pennsylvania; HONORABLE JOHN P. FLAHERTY, Individually, and as a Justice of the Supreme Court of Pennsylvania; HONORABLE JAMES T. MC DERMOTTT, Individually, and as a Justice of the Supreme Court of Pennsylvania; HONORABLE WILLIAM D. HUTCHINSON, Individually, and as a Justice of the Supreme Court of Pennsylvania; HONORABLE STEPHEN A. ZAPPALA, Individually, and as a Justice of the Supreme Court of Pennsylvania; HONORABLE NICHOLAS P. PAPADAKOS, Individually, and as a Justice of the Supreme Court of Pennsylvania,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 87-3664)

Argued: February 5, 1988
Before: TIMBERS, WINTER
and ALTIMARI, Circuit Judges*
(Filed: Feb 29 1988)

ARTHUR W. LEFCO, ESQ. (Argued)
HAROLD CRAMER, ESQ.
ALAN C. MILSTEIN, ESQ.
MESIROV, GELMAN, JAFFE, CRAMER &
JAMIESON
15th Floor, The Fidelity Building
Philadelphia, PA 19109

Attorneys for Appellant

HOWLAND W. ABRAMSON, ESQ. (Argued)
CHARLES W. JOHNS, ESQ.
1515 Market Street
Suite 1414
Philadelphia, PA 19102

Attorneys for Appellees

---

*This panel of Second Circuit judges is sitting as a panel of the Third Circuit pursuant to designation and assignment by the Chief Justice of the United States, 28 U.S.C. §§ 291(a) and 294(d) (1982), following certification by the Chief Judge of the Third Circuit that there is a necessity for the designation and assignment of judges of another circuit to perform duties as a panel in the Third Circuit, all the judges of the Third Circuit having recused themselves on the instant appeal.

OPINION OF THE COURT

TIMBERS, Circuit Judge:

Appellant Peter M. Stern, a former member of the Pennsylvania bar until he was disbarred by the Supreme Court of Pennsylvania, appeals from a judgment entered August 17, 1987 in the Eastern District of Pennsylvania, Marvin Katz, District Judge, denying Stern's application to stay the order of the Supreme Court of Pennsylvania which disbarred him. Appellees are the Honorable Robert N.C. Nix, Jr., Chief Justice of the Supreme Court of Pennsylvania, and the six other Justice of that Court.

On appeal, Stern claims that the Supreme Court of Pennsylvania violated his right to due process under the Fourteenth Amendment because the Court substituted its own findings for those of a disciplinary hearing committee. Appellees, aside from other arguments, assert that the district court, under the doctrine of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1982), lacked subject matter jurisdiction.

We will enter a judgment ordering that the district court judgment be vacated and remanded with instructions to dismiss the complaint.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.[1/]

Stern was admitted to the Pennsylvania bar on November 21, 1966. In 1980, the year in which the incidents underlying his disbarment took place, Stern had been a partner in the Philadelphia firm of Blank, Rome, Comisky & McCauley ("BRCM") since 1972. One of BRCM's clients, for which Stern was responsible, was the Frankford Quaker Grocery Company ("Frankford Quaker").

1/ This summary of the facts is based in part on a stipulation of facts entered into between Stern and the Chief Disciplinary Counsel ("Disciplinary Counsel") of the Disciplinary Board ("Disciplinary Board" or "Board") of the Supreme

Frankford Quaker began having difficulty with its employees when layoffs resulted in work slow-downs and retaliatory vandalism. Frankford Quaker approached Teamsters Union, Local 500 (the union representing its employees), with a request that it control its members. When the union refused to cooperate, Frankford Quaker "pressured" Stern into "carrying" $5,000 to the President of the Union, William O'Farrell. Stern initially refused because he believed it would be an illegal "pay off". Nevertheless, when Frankford Quaker threatened to dismiss him as its attorney, Stern agreed to deliver the money and did so.

(cont'd)

Court of Pennsylvania in September 1985. See p. 5 infra.

The first time Stern approached O'Farrell the union president refused to accept any money. Stern asserts that O'Farrell said he would make no concessions in consideration of any payment. When Stern returned to Frankford Quaker he was told to deliver the money anyway "couched in terms of a Christmas gift", as Stern put it. This time, O'Farrell accepted the money. According to Stern, O'Farrell made it clear that he would not be influenced in any way by the funds. Stern says that he believed the money actually was a gift. Indeed, the retaliating employees did not change their behavior.

In early 1982, the Federal Bureau of Investigation ("FBI") began to investigate O'Farrell's extortion activities. Upon learning of Stern's dealings with O'Farrell, the FBI

requested the Justice Department to inform the Disciplinary Board of Stern's involvement with O'Farrell. The Department did so.

On January 14, 1985, the Disciplinary Counsel of the Disciplinary Board filed a petition for discipline against Stern. The Disciplinary Counsel charged him with violations of various Pennsylvania Disciplinary Rules of the Code of Professional Responsibility ("DR"). Specifically, he was charged with violating DR 1-102(A)(3) (prohibiting lawyers from engaging in illegal conduct involving moral turpitude); DR 1-102(A)(4) (prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(6) (prohibiting lawyers from engaging in conduct adversely reflecting on their

fitness to practice law); and DR 7-102(A)(7) (prohibiting lawyers from counseling or assisting clients in conduct they know to be fraudulent or illegal).

In September 1985, Stern and the Disciplinary Counsel entered into a comprehensive stipulation of facts, in which Stern stipulated, among other things, that he had violated DR 7-102(A)(7).

The Hearing Committee ("Hearing Committee") of the Disciplinary Board held an evidentiary hearing on September 26, 1985. The Hearing Committee filed its report on February 27, 1986, including findings of fact and conclusions of law. The report recommended, first, dismissal of the charges brought under DR 1-102(A)(3), (4) and (6); and, second, a private informal

admonition or private reprimand (two relatively lenient sanctions) with respect to the charges brought under DR 7-102(A)(7). The Hearing Committee explicitly found that, when Stern made the $5,000 payment to O'Farrell, neither Stern nor his client, Frankford Quaker, expected to influence O'Farrell. The Hearing Committee stated, "[w]e find that the payor's (i.e. [Stern's] and/or his client['s]) intent was to make a gift and not buy a result."

The Board reviewed the Hearing Committee's report and the record. On July 7, 1986, the Board concluded that Stern should receive the more serious sanction of public censure. It stated that it found incredible Stern's assertion that the $5,000 was given without the hope of influencing O'Farrell. Moreover, it stated that

there was no doubt that Stern "knowingly delivered the questioned payment" and that the payment violated the law.

On October 9, 1986, the Supreme Court of Pennsylvania ordered Stern to show cause why he should not be disbarred. Stern requested a hearing and oral argument. On November 10, 1986, the Supreme Court denied the request for a hearing, but granted the request for oral argument. Stern and the Disciplinary Counsel submitted briefs. The Disciplinary Counsel requested that Stern not be disbarred. The Supreme Court heard oral argument on January 29, 1987.

In a judgment entered June 3, 1987, the Supreme Court ordered Stern disbarred. The Supreme Court stated that it had independently reviewed the record, pursuant to a Pennsylvania law that provides that in disciplinary matters the

Supreme Court is not bound by the findings of fact of the trier of fact and may evaluate the evidence itself. See Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 579-80, 506 A.2d 872, 875 (1986). The Supreme Court concluded that no credible evidence supported the Hearing Committee's finding that Stern did not intend to bribe O'Farrell. It further concluded that Stern did intend the $5,000 as a bribe.

On June 17, 1987, Stern commenced the instant action pursuant to 42 U.S.C. § 1983 (1982) in the Eastern District of Pennsylvania. He sought a temporary restraining order, a preliminary injunction, and a permanent injunction. He sought a stay of the state court order disbarring him. He asserted that, since the Supreme Court allegedly had rejected the findings of

fact of the Hearing Committee and had substituted its own findings on matters of credibility, it should have granted him a further evidentiary hearing.

On June 19, 1987, the district court entered its order denying a temporary restraining order. On June 29, 1987, after holding a hearing, the district court entered its order denying a preliminary injunction, holding that the Supreme Court had not substituted its judgment on matters of credibility. The district court held (1) that Stern's likelihood of success on the merits was slim; and (2) that the benefit of preserving the integrity of the bar outweighed the harm to Stern, even though that harm was serious. Prior to entering judgment, the district court denied the motion by counsel for the Justices of the Supreme Court to dismiss the action on

the grounds of lack of subject matter jurisdiction and issue and claim preclusion.

Stern appealed to our Court from the district court's order of June 26, 1987. He filed a motion in our Court to stay the state court order pending appeal. On July 2, 1987, we denied the motion. After Stern withdrew his initial appeal and requested a remand to the district court, we dismissed his appeal on August 10, 1987 for failure to prosecute under Fed. R. App. P. 42(b). On August 17, 1987, the district court entered judgment denying Stern's application to stay the Supreme Court's order disbarring Stern. From the judgment the instant appeal was taken.

For the reasons stated below, we vacate the judgment of the district

court and remand to that court with instructions to dismiss the complaint.

II.

Congress has provided that "[f]inal judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . ." 28 U.S.C. § 1257 (1982). The Court in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), squarely held that § 1257 provides that only the Supreme Court may review decisions of the highest court of a state. "[N]o court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment . . . ." Id. at 416. The Court reaffirmed its Rooker holding in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482

(1983), stating that a district court has "no authority to review final judgments of a state court in judicial proceedings" and "[r]eview of such judgments may be had only in this Court." Id. at 482. The Feldman Court stated, however, that a district court would have subject-matter jurisdiction over "general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." Id. at 486. A district court "may simply be asked to assess the validity of a rule promulgated in a nonjudicial proceeding." Id. The Court emphasized, however, that a district court still does not have jurisdiction over "challenges to state-court decisions in particular cases arising out of judicial proceedings even if those

challenges allege that the state court's action was unconstitutional." Id. (emphasis added). It is undisputed that the instant case arises out of a judicial proceeding.

Having drawn this distinction between general and particular challenges, the Feldman Court also stated that a particular challenge would not be saved by the mere fact that the plaintiff had failed to raise the constitutional challenge in the state court; and that, as a result, the state court never adjudicated the issue and Supreme Court review therefore would be unavailable. The Fifth Circuit had reasoned, in Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981) (cited in Feldman, 460 U.S. at 482 n.16), cert. denied sub nom. Howell v. State Bar of Texas, 466 U.S. 950 (1984), that,

since Supreme Court review would be unavailable and the state court had not adjudicated the federal issue, the district court would have jurisdiction over the constitutional claims in such a case. The Feldman Court, however, stated that "[i]f the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon the review the state-court decision. This the district court may not do." Feldman, supra, 460 U.S. at 482 n.16. "By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court." Id. (emphasis added).

The jurisdictional issue in the instant case turns upon whether Stern's constitutional challenge to the actions of the Supreme Court of Pennsylvania should be viewed as a "general challenge" or a challenge to a state court decision in a "particular case". As the Tenth Circuit observed in Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1433 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), the line between the two "is often difficult to draw."

In order to resolve this issue, we first must determine just which state court rule or rules Stern has challenged -- a matter left less than clear in Stern's briefs. The record as a whole indicates that Stern has challenged the combined effect of two state court rules: (1) the court-made rule that review of attorney discipline hearings by the

Supreme Court of Pennsylvania is de novo and that during such review the Supreme Court is not bound by the findings of either the Hearing Committee or the Disciplinary Board, see Keller, supra, 509 Pa. at 579-80, 506 A.2d at 875; and (2) the Pennsylvania Rule of Disciplinary Enforcement that provides attorneys facing disciplinary charges with the right to oral argument before the Supreme Court of Pennsylvania, see Pa. R.D.E. 208(e)(3), but makes no provision for an evidentiary hearing before the Supreme Court. These two rules together allow the Supreme Court to reject the findings of the Hearing Committee and the Disciplinary Board on a "cold record". i.e., without affording the attorney an evidentiary hearing before it. It is this rule or practice which Stern challenges.

In the instant case, a cursory examination of the introduction to the complaint suggests that Stern is mounting a general challenge to this rule or practice, for the complaint opens by stating that the purpose of the action is "not to seek direct review of the action of the Justices of the Supreme Court of Pennsylvania but rather to assert a generalized challenge to the constitutionality of these rules and procedures." Despite this genuflecting to the Rooker- Feldman doctrine, closer consideration convinces us that Stern's complaint is simply a skillful attempt to mask the true purpose of the action, which essentially is to reverse the judicial decision of the Supreme Court of Pennsylvania, in contravention of Rooker-Feldman.

In his complaint, Stern demands a declaratory judgment and a permanent injunction restraining the Supreme Court of Pennsylvania from disbarring him and other similarly situated attorneys unless the Supreme Court, in any case in which it plans to reject the findings of the Hearing Committee (which of course would include Stern's case), first grants an evidentiary hearing to the attorney. This demand for a permanent injunction, while drafted to sound like a remedy for a general challenge, is in itself problematic. In a sense, any attempt to enjoin the enforcement of a state court judgment, even conditionally, as in this case, is suspect. If granted, the federal court would effectively reverse the state court judgment, and thus "review [a] final judgment[] of a state

court in judicial proceedings", contrary to Rooker-Feldman.

The fact that Stern also purports to act on behalf of other similarly situated attorneys (who probably are few in number since the class would be limited to those attorneys who face rejection of the Hearing Committee's findings by the state court) does not change the fact that he is essentially seeking reversal of his own judgment. Moreover, as the proceedings continued, the veneer of the "general challenge" became increasingly thin.[2/] Stern moved for a temporary restraining

---

2/ For this reason, Razatos, supra, does not help Stern. In Razatos, the plaintiff requested only declaratory relief and a hearing, not an injunction, 746 F.2d at 1430, and, in contrast to Stern, maintained the general nature of his challenge throughout the proceedings. Id.

order and a preliminary injunction, both of which required him to demonstrate the likelihood of success on the merits and irreparable harm to himself, thus shifting the focus to the actions of the Supreme Court of Pennsylvania in his particular case. The complaint and the stipulation of facts contained extensive exposition of the specific facts in Stern's case, which hardly would have been necessary if the district court were being asked only to "assess the validity" of the rule in its general application. By the time of his appellate briefs, Stern had become completely focused on his own case. In his brief headings Stern asserted that in disbarring him, the Supreme Court, pursuant to its rules and procedures, rejected the Hearing Committee's findings and that as a result "the Supreme Court violated Stern's right

to due process of law" (emphasis added). Dropping the reference to other "similary situated" attorneys, Stern, in the conclusion to his brief, requested an order "permanently enjoining the Supreme Court of Pennsylvania's Order disbarring Stern from the practice of law."[3/]

In short, a close examination of Stern's case demonstrates that, despite his attempt to draft his complaint in the form of a general challenge to a state court rule, he in reality is seeking review of a state court judgment in his particular case.

3/ The fact that Stern did not raise his constitutional claims in the state court does not change the analysis. As stated above, Feldman held that failure to raise constitutional claims in the state court means only that the plaintiff may have waived his right to raise those claims in any court. See supra pp. 8-9.

This does not pass muster under Rooker-Feldman. It requires dismissal of the complaint.

III.

To summarize:

We hold that under the Rooker-Feldman doctrine the district court lacked subject matter jurisdiction. We will enter a judgment ordering that the district court judgment be vacated and remanded with instructions to dismiss the complaint.

We order that the mandate issue forthwith.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER M. STERN	:	CIVIL ACTION
	:	
v.	:	
	:	
HONORABLE ROBERT N.C. NIX, JR. INDIVIDUALLY AND AS CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA, ET AL.	:	NO. 87-3664

J U D G M E N T

AND NOW, this 14th day of August, 1987, judgment is hereby entered for the defendants and against the plaintiff for the reasons that follow:

1. The plaintiff has not met his burden under the flexible due process balancing test outlined by the Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d.18 (1976). See Razantos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984).

2. That test requires the consideration of three factors: a) "the

private interest that will be affected by the official action"; b) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; c) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Matthews v. Eldridge, 424 U.S. at 335.

3. While it is true that Stern has a substantial private interest in his license to practice law, under the balancing test above he has not been denied due process and has not been unconstitutionally deprived of a right. The due process rights required in an attorney discipline proceeding are not

coextensive with those required in a criminal case, Razantos, supra at 1435.

4. The Pennsylvania Supreme Court did not challenge the factual findings of the Hearing Committee or the Disciplinary Board, but rather, came to a different conclusion as to the appropriate sanction. Therefore, the probable value of an additional evidentiary hearing is minimal; and since there is not a question of conflicting facts or testimony, the risk of an erroneous deprivation is also low. Thus, the practical concern for accurate results that is the focus of the Due Process Clause, U.S. v. Raddatz, 447 U.S. 667, 684 (Blackmun, J. concurring) is not threatened here.

5. The Pennsylvania Supreme Court also has a strong interest in maintaining a high standard of

professional conduct among attorneys practicing in Pennsylvania, and in enforcing Disciplinary Rules diligently. While the Supreme Court may rely on some conclusions of the Disciplinary Board, it is not bound by the Board's findings or recommendations. The Supreme Court also has a valid interest in putting its resources to the best use and in not burdening itself with an additional evidentiary hearing that the Supreme Court determines would not be useful in this case. Requiring such a hearing in this case would be too great a burden on the court and would run counter to the Committee and Board's purpose of freeing the court from developing the entire record independently. Razantos, supra at 1437.

6. There has been no denial of due process under the flexible

balancing test in this case. The Supreme Court's exercise of its discretion to deny an evidentiary hearing in this matter does not offend the Constitution. The strong government interest combined with the low risk of error and low probable value of additional procedures in this particular matter outweigh the private interest in obtaining an additional hearing.

7. The findings and conclusions in my Order of June 26, 1987 are incorporated herein.

8. The Clerk shall file the attached letter dated August 12, 1987, reflecting the agreement of the parties.

BY THE COURT:

_____

MARVIN KATZ, J.

[J-16-1987]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 551 Disciplinary Docket No. 551 Disciplinary Docket No. 2
Petitioner:	:	
v.	:	Disciplinary Board No. 2 DB85
PETER M. STERN,	:	Attorney Registration No. 03314
Respondent:	:	
(Philadelphia)	:	ARGUED: January 29, 1987

OPINION

NIX, C. J. FILED: June 3, 1987

This Court, in response to the Report and Recommendation filed in this matter by the Disciplinary Board of the Supreme Court of Pennsylvania ("Board"), has issued a Rule to Show Cause why

Respondent, Peter M. Stern, should not be disbarred from the practice of law in the Commonwealth of Pennsylvania. Having considered the pleadings and briefs filed by Respondent and the Office of Disciplinary Counsel, having heard oral argument and after a full review of the record submitted by the Board, we are constrained to conclude that the Rule to Show Cause must be made absolute and Respondent disbarred.

I.

The Office of Disciplinary Counsel filed a Petition for Discipline on January 14, 1985, in which it alleged that Respondent had violated four provisions of the Disciplinary Rules of the Code of Professional Responsibility, specifically:

(1) DR 1-102(A)(3), prohibiting an attorney from engaging in illegal conduct involving moral turpitude;

(2) DR 1-102(A)(4), prohibiting an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

(3) DR 1-102(A)(6), prohibiting an attorney from engaging in other conduct which adversely reflects on his fitness to practice law; and

(4) DR 7-102(A)(7), prohibiting an attorney from counselling or assisting a client in conduct the attorney knows to be illegal or fraudulent.

The immediate predicate for the Petition for Discipline was a letter in response to a request from the Office of Disciplinary Counsel, from the United States Attorney for the Eastern District of Pennsylvania. That letter stated that Respondent had been one of the principal

government witnesses in the prosecution of William O'Farrell, President of Teamsters' Union Local 500, for attempting to extort a Fifteen Thousand Dollar ($15,000.00) bribe from one of Respondent's clients. The United States Attorney further related of Investigation that Respondent had made an unrelated payment of that he had been aware of an allegation made by the Federal Bureau of Investigation that Respondent had made an unrelated payment of Five Thousand Dollars ($5,000.00) to O'Farrell on behalf of another client, and that Respondent made admissions concerning that allegation.

The Petition for Discipline was referred to a Hearing Committee on

February 14, 1985.[4/] That Committee conducted a hearing on September 26, 1985, during which a detailed stipulation of facts was adopted, and filed its Report on February 27, 1986. The Hearing Committee found that Respondent had violated only DR 7-102(A)(7), and recommended a private informal admonition

---

4/ At an early stage of the proceedings before the Hearing Committee, Respondent argued that the corpus delicti rule employed in criminal prosecutions should be applicable in Disciplinary Board proceedings. A majority of the Hearing Committee assigned to this matter rejected that contention. That argument was not subsequently raised before the Board. Respondent has attempted to revive his corpus delicti theory before this Court. Having entered into a stipulation of facts to obviate the need for testimony to establish his culpability and to improve his chances for lenient treatment, Respondent will not now be heard to complain that his admissions are insufficient evidence to prove his transgressions.

by Disciplinary Counsel or, at most, a private reprimand by the Board. See Pa. R.D.E. 204(a)(5), (6). Exceptions were filed by the Office of Disciplinary Counsel and, on April 9, 1986, the matter was referred to the Board. In its Report and Recommendation, transmitted to this Court on July 7, 1988, the Board concluded that Respondent had violated DR 1102(A)(3), DR 1-102(A)(4), DR 1-102(A)(6), and DR 7-102(A)(7), and recommended the imposition by this Court of a public censure, see Pa. R.D.E. 204(a)(3), and the payment of costs, see Pa. R.D.E. 208(g)(1).

Upon consideration of the Board's Report and Recommendation, this Court issued upon Respondent a Rule to Show Cause why he should not be disbarred. Respondent's request for oral

argument was granted.[5/] Having been briefed and argued, this matter is now ripe for disposition.

II.

Our scope of review and the criteria which guide us in evaluating the evidence in attorney disciplinary matters have been recently set forth in Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 506 A.2d 872 (1986):

> Before analyzing the testimony offered in support of the charges it

---

5/ Pursuant to Pa. R.D.E. 208(e)(3), Respondent had an absolute right to oral argument upon request. Respondent, however, also requested an evidentiary hearing before this Court, a procedure for which the Rules of Disciplinary Enforcement make no provision. This writer denied that request on November 10, 1986.

must be noted that this Court's review of attorney discipline is a de novo one. Thus, we are not bound by the findings of either the Hearing Committee or the Disciplinary Board. Matter of Green, 470 Pa. 164, 368. A.2d 245, (1977); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976); Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616 (1975), cert. denied, 424 U.S. 926, 96 S.Ct. 1139, 47 L.Ed. 2d 336 (1976). Although we are free to evaluate the evidence presented before the Hearing Committee, In re Silverberg, 459 Pa. 107, 327 A.2d 106 (1974), cert. denied, 456 U.S. 975, 102 S.Ct. 2240, 72 L.Ed. 2d 849 (1982), we may be enlightened by the decisions of these triers of fact who had the opportunity to observe the demeanor of the witnesses during their testimony. Matter of Green, supra; Office of Disciplinary Counsel v. Walker, supra; Office of Disciplinary counsel v. Campbell, supra. ....Nor is the petitioner required to

> establish the misconduct through direct evidence. The ethical violations may be proven solely by circumstantial evidence. Office of Disciplinary Counsel v. Grigsby, supra;
>
> Lemisch's Case, 321 Pa. 110, 184 A. 72 (1936);
>
> Salus's Case, 321 Pa. 106, 184 A. 70 (1936).
>
> Id. at 579-80, 506 A.2d at 875.

We will first consider the findings of fact made by the Hearing Committee. Prior to the hearing in this matter, Respondent and the Office of Disciplinary Counsel entered into detailed stipulations which were ultimately adopted by the Hearing Committee as findings of fact. The

relevant facts as set forth in those stipulations are as follows.[6/]

Respondent was born in 1941 in Philadelphia. He graduated from Cheltenham High School, where he was editor-in-chief of the school newspaper. Respondent then attended Dartmouth College, where he was vice-president of his class and managed the campus radio station. While at Dartmouth Respondent won a fellowship which enabled him to work for academic credit at the National Labor Relations Board in Washington, D. C. Respondent graduated from Dartmouth with high honors in 1963 and subsequently entered the University of Pennsylvania Law School, where he was an editor of its

---

6/ Facts omitted from the Stipulations will be provided in footnotes and in subsequent text.

Law Review, wrote several articles on labor law, and assisted 8 professor in writing a labor law treatise. He graduated from law school cum laude in 1966 and was admitted to the Pennsylvania Bar in November of that year.

Following law school Respondent practiced labor law for three years as an associate with the firm of Goodis, Greenfield, Narin and Mann. In 1969 Respondent moved to the firm of Blank, Rome, Comisky and McCauley ("Blank, Rome") and became a partner in that firm three years later. At Blank, Rome, Respondent supervised several other attorneys in the labor section. He also chaired the Philadelphia Bar Association's Labor Law Committee during the mid-1970's.

Respondent was responsible for some of Blank, Rome's most significant

labor clients, including numerous clients in the food and paper converting industries. One of the largest of those clients was the Frankford Quaker Grocery Company ("Frankford Quaker"), which served a local supermarket chain. In 1980 Frankford Quaker experienced financial difficulties due to a shrinkage in volume and sought the cooperation of Local 500 of the Teamsters Union, which represented Frankford Quaker's employees, with regard to work assignments. Officers of Frankford Quaker asked respondent to deliver Five Thousand Dollars ($5,000.00) to William O'Farrell, President of Local 500, in the hope that O'Farrell would not oppose the requested assistance. Respondent initially refused to deliver the money but eventually acceded to his client's demands when Frankford Quaker threatened to retain

other counsel. Respondent met with O'Farrell on two occasions, successfully delivering the Five Thousand Dollars ($5,000.00) on the second occasion.

Some time later O'Farrell demanded that another of Respondent's clients, Data File, Inc., pay O'Farrell a Fifteen Thousand Dollar ($15,000.00) bribe. Respondent refused and advised Data File not to make such a payment, whereupon he was discharged as counsel. In early 1982 the Federal Bureau of Investigation ("FBI") began investigating bribes allegedly extorted by O'Farrell. Respondent met with two Assistant United States Attorneys and an FBI agent in or about January, 1983. During the meeting, Respondent acknowledged his delivery of

Frankford Quaker's funds to O'Farrell.[7/] Based on the information provided by Respondent concerning O'Farrell's alleged attempt to extort money from Data File, Inc., the federal government obtained the indictment of O'Farrell in the United States District Court for the Eastern District of Pennsylvania. Respondent

---

7/ The FBI had learned of Respondent's payment to O'Farrell from a confidential source and had furnished the United States Attorney with that information. See N.T. Sept. 2, 1985 at 9-10, 14, 47. The prosecution was concerned that the information concerning Respondent's prior involvement with O'Farrell was subject to disclosure to the defense under Brady v. Maryland, 373 U.S. 83 (1963), as exculpatory evidence. We find it disturbing, however, that the United States Attorney's office did not, upon acquiring that information, also immediately communicate it to the Disciplinary Board pursuant to DR1-103.

served as the principal prosecution witness.[8/]

In Paragraph 11 of the Stipulations Respondent admits that his delivery of the funds to O'Farrell in violation of the Labor Management Relations Act violated DR7-102(A)(7). The Stipulations also include various evidence in mitigation, which shall be discussed later.

In addition to adopting the Stipulations summarized above, the Hearing Committee made two additional findings of fact:

8/ Respondent did not request immunity, but the prosecution nevertheless immunized him as a precaution. While the stipulations do not address the outcome of the trial, it appears from the record of the instant matter that O'Farrell was acquitted. N.T. Sept. 26, 1985 at 122.

> 6.1 On the second occasion, when O'Farrell accepted the $5,000 proferred by Respondent, O'Farrell told respondent that he, O'Farrell[,] considered it a gift and that he did not intend to do anything for it.
>
> 6.2 On the second occasion when Respondent proferred and O'Farrell accepted the $5,000.00, Respondent did not expect or intend that O'Farrell would be influenced in respect to any of his actions, decisions, or duties as a representative of Frankford Quaker employees.

The Disciplinary Board in its Report and Recommendation to this Court questioned these two findings but did not decide whether Respondent's payment to O'Farrell was a bribe or a gift. The Board did, however, recognize that either type of payment would violate federal

law.[9/] This Court considers the intent to influence a crucial factor in determining the gravity of Respondent's breach of our ethical standards. Accordingly, we have independently examined the record before us, as is our right and obligation, and have concluded that the Hearing Committee's findings with respect to Respondent's delivery of Frankford Quaker's funds to O'Farrell are supported by no credible evidence.

The Hearing Committee's finding that Respondent's payment to O'Farrell was a mere "gift" is at odds with

---

9/ Section 302 of the Labor Management Relations Act, 2 U.S.C. §186, is "a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative." United States v. Ryan, 350 U.S. 229, 305 (1956).

evidence furnished by the United States Attorney's office and with Respondent's own testimony. In its letter to the Board dated December 19, 1983, the United States Attorney's Office states:

> Stern explained that he represented a client named "Frankford-Unity, Inc.," as labor lawyer. The client had a dispute with its employees, who were represented by Local 500 of the Teamsters Union, Stern explained that the company was having financial problems and that it needed some concessions from the union in terms of work rules, or in terms of having work done by outside contractors. The precise nature of the dispute is not clear to either of us but, in any event, it [is] clear that the following events occurred. Stern explained that his clients, whose names he did not give requested that he give $5,000 to O'Farrell so that O'Farrell would "backoff" from his position opposing any concessions. (Emphasis added.)

The testimony of Assistant United States Attorney Robert E. Welsh, Jr., during the September 26, 1985, hearing is to the same effect:

> Mr. Stern told us that he had represented a client, and it is my memory that he said Frankford-Unity, Incorporated, as a labor lawyer. And that this client was some sort of trucking company that had a labor problem. It was represented by Teamsters Local 500. This is in 1980 that this labor problem occurred. The labor problem dealt with a dispute over work rules in that--or job security might be a better way to say it--in that the company wished to farm out certain work. I don't know what kind of work, we did not get into that. But the point is that the Teamsters 500 was resisting, claiming and arguing that its employees or its members were entitled to the work. This is not an uncommon type of labor dispute.
>
> At this point, according to Mr.

> Stern, his clients developed the idea of attempting to influence a [sic] O'Farrell with a payment of some form of consideration. (Emphasis added.)
>
> N.T. September 26, 1985, at 15.

At the hearing Respondent characterized his discussion with Frankford Quaker's representatives concerning the payment as follows:

> Well, they cast around for something to do and in a discussion with me, they said, if you can't help us by discipline and fighting them, and we're paying you this retainer, and more than the retainer sometimes, we are going to have to take another tack. We are going to have to do something else. There was discussion about--I don't remember the words or the give and take) but they said something to the effect, we want to see if paying him softens his attitude. (Emphasis added.)

N.T. September 26, 1985, at 141.

From the foregoing it is clear that the purpose of the payment to O'Farrell was to influence him in his capacity as President of Local 500 and that Respondent was well aware of that fact. O'Farrell's initial unwillingness to cooperate serves as additional evidence of Respondent's full appreciation of the character of the transaction. The impact of Respondent's self-serving testimony with regard to his intent as to the effect of the payment pales before the overwhelming evidence to the contrary. We conclude, therefore, that Respondent facilitated an attempt by Frankford Quaker to bribe O'Farrell.

Respondent's testimony establishes that he knew such a payment would be illegal and so informed his client: "I said, don't do it, it's

against the law. I said, I can't get involved in it." N.T. September 26, 1985, at 87. As a seasoned labor attorney, Respondent would have been familiar with section 302 of the Labor Management Relations Act, 29 U.S.C. §186, which provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--
>
> (1) to any representative. of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would

admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of

> employees or as such officer or employee of such labor organization.
>
> 29 U.S.C. §186(a) (emphasis added).[10/]

Respondent was reluctant to accede to Frankford Quaker's demands; his scruples, however, were overcome by his desire to keep an important client. Respondent described his motivation as follows:

> I have thought in my own mind there were two pressures. One was to maintain an advance of position, where I was

---

10/ Prior to 1984, subsection (d) of section 302 provided that willful violation of the section was a misdemeanor punishable by a fine of up to $10,000 and/or imprisonment for up to one year. In 1984 subsection (d) was amended to provide that a payment violative of section 302 in excess of $1,000 is a felony punishable by a fine of up to $15,000, or imprisonment for up to five years, or both. 29 U.S.C. §186(d).

> trying to build the labor law practice at the firm. It was a fast track. I was charged with going out and hustling business, trying to do that sort of thing. I was pressed by the client because he said, you know, somebody else will do it if you don't. I would lose the client. And I was not right. I was weak. I should have said, well, then get yourself another lawyer. Get yourself another lawyer. I have never done anything like it before, never since, and if I had some--I thought I was intimate with these guys at Frankford Quaker. I thought I was solid with them. I thought that, you know, I was in an ascending position with the law firm.
>
> N.T. September 26, 1985, at 145.

From the foregoing evidence it is clear that Respondent knew he was being requested to violate the law and made a deliberate decision to do so rather than suffer what he perceived as a

setback to his career. His ethical judgment was compromised by purely selfish financial considerations. On this record we must conclude that Respondent committed a serious breach of the Disciplinary Rules, violating DR 1-102(A)(3), which prohibits an attorney from engaging in illegal conduct involving moral turpitude;[11/] DR 1-102(A)(6), which prohibits an attorney from engaging in other conduct which adversely reflects on his fitness to practice law; and DR 7-102(A)(7), which prohibits an attorney from

---

11/ In our recent decision in Office of Disciplinary Counsel v. Simon, 5 Pa. 312, 507 A.2d 12 (1986), this Court defined "moral turpitude" as "'...anything done knowingly contrary to justice, honesty, principle, or good morals.'" Id. at 320, 507 A.2d at 1220, quoting Muniz v. State, 575 S.W.2d 408, 411 (Tex. 1978).

counselling or assisting a client in conduct the attorney knows to be illegal or fraudulent.)[12/]

12/ We do not agree with the Office of Disciplinary Counsel that a violation of DR 1-102(A)(4), which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, is established by the record. We recently interpreted that rule in Office of Disciplinary Counsel v. Simon:

> Although there is, in the broadest sense, dishonesty involved in every crime, we do not (nor did the Board) find that respondent's conduct involved dishonesty, fraud, deceit, or misrepresentation. To charge respondent with a violation of this rule under the facts presented in this case would be to make this rule too broad and all encompassing. The rule should be construed in its normal sense and "dishonesty" should not be taken out of context. Rather, it should be considered as it is commonly associated with those violations involving theft, misappropriation, etc. See, e.g., Office of Disciplinary Counsel v.

Having ascertained that Respondent has committed multiple serious violations of our Disciplinary Rules, we

---

(cont'd)

> Lewis, 493 Pa. 519, 426 A.2d 1138 (1981).
>
> 510 Pa. at 320 n.7, 507 A.2d at 1219-1220 n.7.

The common element in dishonesty, fraud, deceit and misrepresentation is deviation from the truth, as is illustrated by our prior disciplinary decisions. See, e.g., Office of Disciplinary Counsel v. Wittmaack, ____ Pa. ___, 522 A.2d 522 (1987) (failure to inform clients of conflicts of interest; fabrication of evidence; false testimony); Office of Disciplinary Counsel v. Tumini, 499 Pa. 284, 453 A.2d 310 (1982) (false swearing before grand jury); Office of Disciplinary Counsel v. Grigsby, 493 Pa. 194, 425 A.2d 730 (1981) (filing sworn pleading known to be false); Office of Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976) (failure to inform client of adverse influences and conflicting interests); Berlant Appeal, 458 Pa. 439, 328 A.2d 471 (1974) (attempted solicitation of perjury); Montgomery County Bar

must now determine the appropriate discipline to be imposed. It should be noted first that disciplinary sanctions are not primarily designed for their punitive effects. Office of Disciplinary Counsel v. Tumini, 499 Pa. 284, 288, 453 A.2d 310, ____ (1982). Rather, as explained in Office of Disciplinary Counsel v. Keller, supra:

> The primary purpose of our system of lawyer discipline is to protect the public from unfit attorneys and to maintain the integrity of the legal system. See In re Oxman, 496 Pa. 534, 437 A.2d 1169 (1981), cert. denied, 456 U.S. 975, 102 S.Ct. 2240, 723 L.Ed.2d 849 (1982); Office of Disciplinary

---

(cont'd)

Association v. Hecht, 456 Pa. 13, 317 A.2d 597 (1974) (false swearing). We find that element absent from Respondent's conduct.

> Counsel v. Lewis, 493 Pa. 519, 426 A.2d 1138 (1981); Office of Disciplinary Counsel v. Grigsby, 493 Pa. 194, 425 A.2d 730 (1981). Disciplinary procedures have been established as a catharsis for the profession and a prophylactic for the public. Office of Disciplinary Counsel v. Lewis, supra 493 Pa. at 528, 426 A.2d at 1142.
>
> Id. at 579, 506 A.2d at 875.

In addition to protecting the public, it is our responsibility to seek to preserve public confidence in the legal profession and the judicial system. See Office of Disciplinary Counsel v. Lewis, 493 Pa. 519, 527, 426 A.2d 1138, 1142 (1981).

> The public position of one who is a member of the legal profession is one of great responsibility. Integrity and the exercise of good faith in an attorney's professional engagements are essential for the protection of the public, the courts and the profession itself. It

> must be fully appreciated that each member of the bar is an officer of the Court. Consequently, it is the solemn duty of the judiciary to insure that the proper standing of its officers is preserved. See Johnson Disbarment Case, 421 Pa. 342, 345, 219 A.2d 593, 395 (1966); In re Davies, 93 Pa. 116, 122 (1880).
>
> Matter of Leopold, 469 Pa. 384, 392, 366 A.2d 227, 230-231 (1976) (footnote omitted).

Rule 204 of the Rules of Disciplinary Enforcement specifies six types of discipline ranging from private informal admonition by Disciplinary Counsel to disbarment by this Court. Pa.R.D.E. 204(a). The nature of the sanction of disbarment was recently described in our decision in Office of Disciplinary Counsel v. Keller, supra:

> Disbarment is an extreme sanction which must be imposed only in the most egregious cases, Office of Disciplinary

Counsel v. Kissel, supra; Matter of Leopold, 469 Pa. 384, 366 A.2d 227 (1976), because it represents a termination of the license to practice law without a promise of its restoration at any future time. It has been deemed appropriate where the misconduct involves the types of breach of trust exhibited in this case. As noted in Johnson Disbarment Case, 421 Pa. 342, 219 A.2d 593 (1966):

> It is the duty of the courts to maintain the integrity of the Bar and to see that courts and its members "do not fall into disrepute with the general public through the unprofessional or fraudulent conduct" of attorneys (Forman's Case, 321 Pa. 47, 184 A. 75). "The power of a court to disbar an attorney should be exercised with great caution, but there should be no hesitation in exercising it when it clearly appears that it is demanded for the protection of the

> public. The court by admitting an attorney to practice endorses him to the public as worthy of confidence in his professional relations, and if he becomes unworthy, it is its duty to withdraw its endorsement...."
>
> Johnson Disbarment Case, supra 421 Pa. at 345-46, 218 A.2d at 595 (citation omitted).

Id. at 588-87, 506 A.2d at 879.

Having fully considered Respondent's serious transgressions against our standards of conduct for attorneys, we are satisfied that disbarment is the only appropriate remedy. Respondent's actions represent a dual injury to the public. First, motivated solely by pride and greed, he permitted himself to be corrupted by his own client, discarding his proper role as legal advisor and becoming a mere conduit

for effectuating his client's illicit intentions. Second, himself corrupted, he succeeded, after repeated efforts, in corrupting a labor leader and thereby disrupting proper labor-management relations in violation of federal law. Such conduct will not be countenanced by this Court.

> As the United States Supreme Court stated in Ex Parte Wall, 107 U.S. 265, 274, 25 S.Ct. 569, 576, 27 L.Ed. 552 (1882): "Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him,...argues recreancy to his position and office.... It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve." Where one who has sworn to uphold the law actively conspires to breach it, his fitness to practice is unquestionably destroyed.
>
> Office of Disciplinary Counsel v. Campbell, 463

Pa. 472, 483, 345 A.2d 616, 622 (1975), cert. denied, 424 U.S. 926 (1876).

Accord, Office of Disciplinary Counsel v. Casety, 511 Pa. 177, 182-183, 512 A.2d 607, 610 (1986). Respondent has grossly abused the privileges entrusted to him and has debased not only himself but also the entire Bar of this Commonwealth, and his continued practice would be inimical to the public interest.

In his pleadings submitted to this Court Respondent has attempted to mitigate the severity of his misconduct. Respondent emphasizes his outstanding success as a labor attorney and his otherwise unblemished disciplinary record. He also points to his contrition and his cooperation with federal law enforcement officials. In addition, Respondent stresses his active participation in professional, community

and religious programs in the Philadelphia area. Finally, Respondent details the economic hardship, loss of social and professional standing and strain on his health and family life he has endured in the wake of his own misbehavior. We find that these factors do not offset the seriousness of Respondent's disciplinary violations or support his contention that he remains fit to practice law. As to Respondent's much emphasized cooperation with the federal authorities, the record reflects that he made his admissions only after being confronted by federal law enforcement officials aware of his misconduct. Cooperation at that point was clearly in his own self-interest. The same is, of course, true with respect to the subsequent disciplinary proceedings. We also note that the

stipulations into which Respondent entered, while admitting misconduct, were hardly a model of candor, and attempt to paint as favorable a picture as possible under the circumstances. Respondent's involvement in professional, civic and religious activities, while laudable is not relevant to our basic inquiry, Respondent's fitness to practice law in this Commonwealth. Moreover, without denigrating Respondent's extracurricular endeavors, we note that such activities are widely employed as a means of professional advancement. Finally, as to the disastrous personal consequences of Respondent's well-publicized misconduct, we must conclude that pleas for sympathy must not obscure this Court's responsibility to protect the public from unscrupulous lawyers. Respondent's downfall is entirely of his own making

and, being the product of a deliberate decision to violate the law, is well-deserved.

For all of the above reasons, we have determined that Respondent must be disbarred from the practice of law in this Commonwealth. Accordingly, the Rule to Show cause is made absolute and Respondent Peter M. Stern is hereby disbarred. It is further ordered that he shall comply with Rule 217, Pa.R.D.E., and pay all costs of these proceedings.

Mr. Justice Papadakos joins in this opinion and files a concurring opinion.

[J-16-1987]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 551 Disciplinary Docket No. 551 Disciplinary Docket No. 2
v.	:	Disciplinary Board No. 2 DB85
PETER M. STERN, Respondent	:	Attorney Registration No. 03314
(Philadelphia)	:	ARGUED: January 29, 1987

CONCURRING OPINION

MR. JUSTICE PAPADAKOS FILED: June 3, 1987

I join the majority opinion, but write separately to express my personal dismay in the fate that has befallen Respondent as the result of his misconduct. His illustrious background

and prominence in the legal community serve to magnify his ethical breaches. It is entirely appropriate to expect the most meticulous adherence to ethical standards from those with exceptional ability. Such attorneys should serve as models for the other members of the Bar and as public symbols of the highest professional ideals. When a member of the elite, such as Respondent, debases himself and violates the law for sheer personal gain, public confidence in the legal profession is destroyed.

Respondent has no right to expect less than disbarment.

(2)

Supreme Court, U.S.
FILED
JUL 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2077

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETER M. STERN,

Petitioner

v.

HONORABLE ROBERT N.C. NIX, JR.
Individually and as Chief Justice
of the Supreme Court of Pennsylvania,
HONORABLE ROLF LARSEN,
HONORABLE JAMES T. MCDERMOTT,
HONORABLE WILLIAM D. HUTCHINSON,
HONORABLE STEPHEN A. ZAPPALA and
HONORABLE NICHOLAS P. PAPADAKOS,
Individually and as Justices of the
Supreme Court of Pennsylvania,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Howland W. Abramson, Esquire
Charles W. Johns, Esquire
1515 Market Street
Suite 1414
Philadelphia, PA 19102
(215) 560-6321
Attorneys for Respondents

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Table of Citations	ii
Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
Counter-Statement of the Case	2
Summary of Argument	6
Reasons for Denying the Writ	7
1. There is no case or controversy because the Respondent Supreme Court's decision to disbar Petitioner Stern was not grounded in a rejection of the Hearing Committee's credibility determination which the Supreme Court would have accepted had Stern been provided with a second evidentiary hearing	7
2. There is no case or controversy because the Respondent Supreme Court does not have a general rule promulgated either administratively or by way of judicial decision which permits it to substitute its judgment on credibility matters for that of the fact finder. Indeed, it has established positive law to the contrary	11
3. There is no federal subject matter jurisdiction over this matter which seeks or requires review of the final judgment of the highest court in the State entered in a judicial proceeding	13
4. As a matter of law, the State Supreme Court's procedures are lawful	16
Conclusion	18

TABLE OF CITATIONS

Cases Page

Federal

Allen v. McCurry, 449 U.S. 90 (1980)..... 14

Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281 (1970)..... 14

Brinkman v. Johnson, 793 F.2d 111 (5th Cir. 1986)..... 16

Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980)..... 14

Czura v. Supreme Court of South Carolina, 623 F.Supp. 267, 270 (D.S.C. 1986)..... 14

District Col. Court of Appeals v. Feldman, 460 U.S. 462 (1983)..... 13

Huffman v. Pursue, 420 U.S. 592 (1975)..... 14

Matsushita v. United States, 750 F.2d 927 (C.A.F.C. 1984)..... 11

Pennzoil v. Texaco, Inc. 481 U.S. ____ , 95 L.Ed.2d 1, 109 S.Ct. 1519 (1987)..... 15

Randolph v. Lipscher, 641 F.Supp. 767 (D.N.J. 1986)..... 16

Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)..... 13, 16

Reed v. Terrell, 759 F.2d 472 (5th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985)..... 16

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985)..... 13

Rogers v. Supreme Court of Virginia, 590 F.Supp. 102 (E.D. Va. 1984)..... 13

TABLE OF CITATIONS—*(Continued)*

Cases Page

Rosquist v. Jarrat Construction Corp., 570 F.Supp. 1206 (D.N.J. 1983) 16

Texaco v. Pennzoil, 748 F.2d 1133 (2nd Cir. 1986) 14

United States v. Raddatz, 447 U.S. 667 (1980). 10, 17

United States v. Ryan, 350 U.S. 229 (1956) 8

Zimmerman v. Grievance Com. of Fifth Judicial District, 726 F.2d 85 (2nd Cir. 1984), *cert. denied*, 467 U.S. 1227 (1984) 12, 16

State

Com. ex rel. Alexander v. Alexander, 445 Pa. 406, 284 A.3d 721 (1971) 11

Commonwealth v. Faraquharson, 467 Pa. 50, 354 A.2d 545 (1976) 9

Commonwealth v. Iannoccio, 505 Pa. 414, 480 A.2d 966 (1984) 10

Commonwealth v. Stanley, 453 Pa. 467, 309 A.2d 408 (1973) 9

Commonwealth v. Sullivan, 436 Pa. 450, 263 A.2d 734 (1970) 9

Commonwealth v. Whack, 482 Pa. 137, 393 A.2d 417 (1978) 12

Commonwealth v. Woodhouse, 401 Pa. 242, 164 A.2d 98 (1960) 9

Kay v. Kay, 560 Pa. 680, 334 A.2d 585 (1975) 10

Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616 (1975), *cert. denied*, 424 U.S. 926 (1975) 11

TABLE OF CITATIONS—*(Continued)*

Cases	Page
State of Nebraska v. Coburn, 352 N.W.2d 605 (Neb. 1984)	10
Statutes	
Labor Management Relations Act, 29 U.S.C. §186	8
Rules	
Pennsylvania Rule of Disciplinary Enforcement 103	17
1-102(a)(3)(4)(6)	3
7-102(A)(7)	3

No. 87-2077

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETER M. STERN,

Petitioner

v.

HONORABLE ROBERT N.C. NIX, JR.
Individually and as Chief Justice
of the Supreme Court of Pennsylvania,
HONORABLE ROLF LARSEN,
HONORABLE JAMES T. MCDERMOTT,
HONORABLE WILLIAM D. HUTCHINSON,
HONORABLE STEPHEN A. ZAPPALA and
HONORABLE NICHOLAS P. PAPADAKOS,
Individually and as Justices of the
Supreme Court of Pennsylvania,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice and Justices of the Supreme Court of the United States:

Your Respondents, the Chief Justice and Justices of the Supreme Court of Pennsylvania respectfully request that the Petition for Writ of Certiorari be denied and offer as reasons therefor, the following:

COUNTER-STATEMENT OF THE CASE

Petitioner Stern ("Stern") is an attorney who was admitted to the Supreme Court of Pennsylvania in 1966. On June 3, 1987, Stern was disbarred by the Supreme Court of Pennsylvania (J.A.574).[1] The disbarment proceedings arose out of an incident which occurred in 1980. At the time of the events, Stern was a partner in the law firm of Blank, Rome, Comisky and McCauley and had been since 1972. Stern was responsible for some of the firm's most significant labor clients, including numerous clients in the food and paper converting industries. One of its largest clients was the Frankford Quaker Grocery Company, ("Frankford Quaker"). (J.A.574). Frankford Quaker was experiencing financial problems and was seeking cooperation from Teamsters Union, Local 500 which represented its employees. (J.A.213). The President of the union was named William O'Farrell ("O'Farrell"). (J.A.575). After "conventional methods" of seeking the union's compliance with the collective bargaining agreement had failed, officers of Frankford Quaker pressured Stern to "carry" from them to O'Farrell the sum of $5,000 in cash. (J.A.575). While Stern initially refused to "carry" the $5,000 to the union leader because it was his opinion that it would be an illegal "pay off", (J.A.248), he eventually acceded to his client's demands on pain of dismissal as its attorney and twice "carried" the $5,000 to O'Farrell as Frankford Quaker's "courier", (J.A.465), to see if paying him would "soften his attitude." (J.A.519). The first attempt to deliver failed because O'Farrell told Stern he would not do anything against the interest of those he represented in exchange for it. (J.A.465). Not to be denied, Stern

---

1. The references to Joint Appendix (J.A.) refer to the joint appendix filed in the United States Court of Appeals for the Third Circuit in this matter under Federal Rule of Appellate Procedure 30.

took the cash back to O'Farrell, this time "couched" as a Christmas gift. (J.A.522). O'Farrell took it. (J.A.466).

Stern testified that O'Farrell said "If it's a gift, I'll take a gift. That's what happened [here]." (J.A.523). In point of fact, the only reason Stern remembered it was at Christmas time when he re-delivered the cash was that his clients "couched it in terms of a Christmas gift." (J.A.522).

Sometime later, O'Farrell made a demand to Stern that another of Stern's clients, Data File, Inc., pay him a $15,000 bribe to prevent or stop a plant organization effort by O'Farrell's union. (Stern's Third Circuit Brief at p.5). This time Stern refused to go along.

On January 14, 1985, the Disciplinary Counsel[2] filed a petition for discipline against Stern charging him with violations of Pennsylvania Rules of Disciplinary Enforcement ("Pa.R.D.E.") 1-102 (A) (3), (4) and (6) and Pa.R.D.E. 7-102 (A) (7). Stern and Disciplinary Counsel thereafter entered into a comprehensive stipulation of facts including Stern's acknowledgment that he violated Pa.R.D.E. 7-102 (A) (7) which prohibits a lawyer from counseling or assisting clients in conduct the lawyer knows to be illegal or fraudulent. (J.A.159). An evidentiary hearing was held before a Hearing Committee of the Disciplinary Board of the Supreme Court of Pennsylvania on September 26, 1985. The Hearing Committee filed its report on February 27, 1986, recommending dismissal of the charges based on Pa.R.D.E. 1-102 (A) (3), (4) and (6) and recommending private informal admonition, or at most private reprimand. (J.A.178).

---

2. The Disciplinary Counsel is appointed by the Disciplinary Board of the Supreme Court of Pennsylvania. The powers, duties and functions of both the Board and Disciplinary Counsel are set forth in the Pennsylvania Rules of Disciplinary Enforcement promulgated by the Supreme Court of Pennsylvania in the exercise of its inherent and exclusive power to supervise the conduct of attorneys who are its officers.

On July 7, 1986, after reviewing the recommendation, the findings of fact and conclusions of law of the Hearing Committee, and the record and the briefs of the respective parties, the Disciplinary Board concluded that the appropriate sanction in this matter was public censure. (J.A.196). Said the Disciplinary Board:

> We find it somewhat incredulous that a company having labor problems would clandestinely deliver $5,000 through its attorney [Stern] to the president of its union with no hope or expectation of influence. However, the decision in this matter is not dependent upon the finding of the Hearing Committee that Respondent and his client were actuated solely by altruism. Regardless of Respondent's [Stern's] motivation, there is no doubt that Respondent knowingly delivered the questioned payment. Whether or not the payment was a bribe or a gift, it violated the law. Clearly, Respondent committed, and then concealed the commission of, the act of making an illegal payment to a union official. The issue then remains whether or not the Hearing Committee erred by dismissing the remaining charges. Respondent had admitted that he counseled and assisted his client in conduct that he knew to be illegal or fraudulent and in violation of DR 1-102 (A) (7).
>
> We would have no difficulty as a fact finder in concluding that Respondent, by his conduct, clearly violated Disciplinary Rules DR 102(A) (3) (4) and (6) in that his conduct was illegal and involved moral turpitude and/or was dishonest and involved fraud, deceit and misrepresentation which reflected on his fitness to practice law. However, it is also unnecessary to decide each of these matters in order to properly frame the decision here. The actual controversy lies in whether or not Respondent should be subject to public discipline despite the

> fact that all parties concede that this matter and his subsequent testimony against O'Farrell have caused him a great deal of professional, personal and economic hardship.
>
> The Hearing Committee recommended that the devastation to Respondent's professional life is such that no further public punishment is warranted. Disciplinary Counsel considered "respondent's evidence of excellent reputation, cooperation with the federal authorities and hardship caused by loss of stature and income and family distress" as factors which caused it not to recommend more serious discipline than Public Censure. Cf. Brief on Exceptions, p 27. The matter of Respondent's transgressions and his dealings with O'Farrell are matters obviously within the public domain. Private punishment of a highly publicized matter that involved a clear violation of law is unwarranted. To the extent that the disciplinary system seeks to maintain the integrity of the bar and judicial process and the confidence of the public in both, informal or private sanctions are inappropriate for an attorney who has knowingly committed a public offense involving violations of an anti-corruption penal statute.

(J.A.202-03).

On October 9, 1987, the Supreme Court of Pennsylvania entered a rule upon Stern to show cause why he should not be disbarred. (J.A.207). On November 3, 1986, Stern requested an oral argument and a second evidentiary hearing. On November 10, 1986, the Supreme Court granted Stern's request for oral argument but denied a second evidentiary hearing. Oral argument was held on January 29, 1987. On June 3, 1987, the Supreme Court issued an Opinion and Order disbarring Stern.

On June 17, 1987, Stern filed the action, out of which his Petition arises, in the federal district court seeking to permanently enjoin his disbarment on the grounds that the Supreme Court had substituted its judgment on matters of credibility for that of the Hearing Committee pursuant to alleged general rules and procedures promulgated and applied by the State Supreme Court. These general rules and procedures have never been cited to nor proven to exist in the proceedings below.

The Honorable Marvin Katz of the federal trial court below entered judgment in favor of the State Supreme Court because on review of the record of the disciplinary proceedings it was his finding that the State Supreme Court had in fact not substituted its judgment on matters of credibility. (J.A.612-17). The trial court, before proceeding to enter judgment, denied the State Supreme Court's motion to dismiss on grounds of, *inter alia*, lack of subject matter jurisdiction and claim and issue preclusion. On Petitioner's appeal, the court of appeals held that under the *Rooker-Feldman* doctrine, the district court lacked subject matter jurisdiction and entered a judgment that the district court judgment be vacated and remanded with instructions to dismiss the complaint.

SUMMARY OF ARGUMENT

The Petitioner rests his case on the false premise that the Respondent State Supreme Court has general rules promulgated in a non-judicial proceeding which permit or a scheme of attorney discipline which permits the State Supreme Court to, without viewing witnesses, substitute its judgment for that of a fact finder on matters of pure credibility. Firstly, there are no such rules and there is no such scheme. Indeed, the State Supreme Court has held that, "It is a basic tenet of our system of jurisprudence that issues of credibility are

properly left to the trier of fact for resolution." Secondly, there was, in Stern's disbarment proceeding, no substitution of judgment on a credibility issue. Thirdly, under its plenary authority, the State Supreme Court has the power to hear evidence *de novo* if appropriate. Finally, Petitioner sought below to permanently enjoin his disbarment which had taken place. His federal complaint and other papers filed with the courts below contain copious detail of evidence which Stern presented to pursuade the trial court that the State Supreme Court had erred in disbarring him. His case against the Respondent is inextricably intertwined with a judicial decision which did not reverse existing law or create new rules or procedures. There was, therefore, no subject matter jurisdiction under the *Rooker - Feldman* doctrine and the Third Circuit Court of Appeals was correct in ordering that Stern's case be dismissed.

REASONS FOR DENYING THE WRIT

1. There is no case or controversy because the Respondent Supreme Court's decision to disbar Petitioner Stern was not grounded in a rejection of the Hearing Committee's credibility determination which the Supreme Court would have accepted had Stern been provided with a second evidentiary hearing.

Stern rested his entire claim that the State Supreme Court substituted its judgment for the Hearing Committee's on the matter of his credibility on the following language contained in the Hearing Committee report:

> 6.2. On the second occasion when Respondent [Stern] proffered and O'Farrell accepted the $5,000, Respondent [Stern] did not expect or intend that O'Farrell would be influenced in respect to any of his actions, decisions, or duties as a representative of Frankford Quaker employees.

(J.A.188)

Of course, Stern missed the point because *his client expected and intended to influence O'Farrell and Stern knew it.* As the Hearing Committee stated, it is the payor's intent that governs. Thus, when the State Supreme Court concluded that the cash payment of $5,000 was intended to influence, it did not do so by simply disbelieving Stern. The most that can be said of Stern is that he did not believe his client's plan would work.

The fact that Stern may have believed the $5,000 would only amount to a gratuity is of no moment. Section 302 of the Labor Management Relation Act, 29 U.S.C. § 186, is "a criminal provision, malum prohibitum, which outlaws all payments, with states exceptions, between employer and representative." *United States v. Ryan*, 350 U.S. 299, 305 (1956).

As the Report of the Disciplinary Board stated when reviewing the Hearing Committee's Recommendation, "We find it somewhat incredulous that a company having labor problems would clandestinely deliver $5,000 through its attorney to the president of its union with no hope of expectation of influence." (J.A.202). The trial court below readily perceived the fault in Stern's logic and readily perceived that Stern knew what his client intended and expected. (J.A.615-16). An examination of the Opinion of the State Supreme Court demonstrates that it concluded that Stern knew that his client did not intend the payment to be a mere gift. (J.A.652-53; Petitioner's Appendix: A.39-43). Thus, when the State Supreme Court stated that it was clear that the purpose of the payment to O'Farrell was to influence him in his capacity as President of Local 500 and that Stern was well aware of that fact, it did not have to disbelieve Stern's self-serving testimony as to his intent vis à vis O'Farrell. The State Supreme court focused on Stern's appreciation of the character of the transaction and not whether he personally expected or intended O'Farrell to be influenced based on O'Farrell's previous declaration that he could not be (which in and

of itself is patently absurd since he asked Stern for a $15,000 bribe thereafter and Stern did not request the $5,000 "gift" back realizing, as he must have, that it had been taken for a bribe). The State Supreme Court concluded that Stern facilitated an attempt by Frankford Quaker to bribe O'Farrell and that Stern knew such a payment would be illegal. (J.A.654).

Petitioner's reliance on the Hearing Committee's finding that the "payor's (i.e. Respondent [Stern] and/or his client's) intent was to make a gift and not buy a result," (J.A.189), is ill-founded, because firstly, Stern testified that his client "couched" the cash as a "gift" and this was Stern's sole evidence of his client's intent. Secondly, where evidence offered to support a result is so unreliable and/or contradictory as to make the result based on pure conjecture, a finder of fact may not be permitted to return such a finding. *See Commonwealth v. Faraquharson*, 467 Pa. 50, 60, 354 A.2d 545, 550 (1976). Thus, while the State Supreme Court adheres to the principle that it will not substitute its judgment for that of the finder of fact, *Commonwealth v. Woodhouse*, 401 Pa. 242, 261, 164 A.2d 98 (1960), for to do so would require an assessment of the credibility of the testimony that is clearly not its function as it has stated, *Commonwealth v. Sullivan*, 436 Pa. 450, 456, 263 A.2d 734 (1970), *cert. denied*, 400 U.S. 882 (1970), this concept must be distinguished from an equally fundamental principle that a result may not be based on surmise or conjecture. *See Commonwealth v. Stanley*, 453 Pa. 467, 309 A.2d 408 (1973). In other words, while credibility is within the province of the finder of fact, the finder is not free to ignore overwhelming evidence in favor of a contrary result not supported by the evidence.

In Stern's case, the Hearing Committee's conclusion as to his client's intent simply was not supported by any competent evidence of record which a reasonable judicial mind could find as supportive of the determination made by the finder of fact. The State Supreme Court

has stated that it is axiomatic that great deference is to be given a finder of fact whose province it is to pass on the credibility or witnesses but that this deference does not extend so far as to allow a finder of fact to base its decision on speculation derived from testimony which it finds credible, *Commonwealth v. Iannaccio*, 505 Pa. 414, 480 A.2d 966 (1984), and findings of fact will be overturned if they are arbitrary and capricious. *See Kay v. Kay*, 560 Pa. 680, 334 A.2d 585 (1975)

Of course the State Supreme Court *could have* rejected (but did not) the Hearing Committee's finding that Stern did not expect or intend O'Farrell to be improperly influenced if it had chosen to focus not upon his client's intent, and his knowledge thereof, but instead on Stern's actual intent. This Court stated in *United States v. Raddatz*, 447 U.S. 667 (1980), a case upon which Stern so heavily relies, that:

> Here [the] District Judge was faced with a transcript that contained two irreconcilable accounts of critical facts. Neither version was instrincally incredible or, for that matter, less plausible on its face than the other. Moreover, there was in the record no evidence inherently more trustworthy than supported by human recollection. *In these circumstances*, the District Judge could not make the statutorily mandated "de novo determination" without being exposed to the one kind of evidence that no written record can ever reveal—the demeanor of the witnesses. (emphasis supplied).

Id. at 691.

As has been observed above, the State Supreme Court does not substitute its judgment on credibility matters when there is sufficient evidence to support the conclusion of the fact finder. However, wrongful intent may be inferred from circumstantial evidence despite self-serving testimony. *State of Nebraska v. Coburn*, 452 N.W.2d 605 (Neb. 1984) (intent sufficient to support a

conviction for burglary may be inferred from facts and circumstances surrounding illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent even if defendant has offered self-serving testimony). And in fact, circumstantial evidence may be more reliable than self-serving declarations. *Matsushita v. United States*, 750 F.2d 927, 934 (C.A.F.C. 1984). As the State Supreme Court stated, "The impact of [Stern's] self-serving testimony with regard to *his* intent as to the effect of the payment pales before the overwhelming evidence to the contrary." (J.A.653-54).

2. There is no case or controversy because the Respondent Supreme Court does not have a general rule promulgated either administratively or by way of judicial decision which permits it to substitute its judgment on credibility matters for that of the fact finder. Indeed, it has established positive law to the contrary.

The law in Pennsylvania with respect to *de novo* review of attorney discipline matters provides that the State Supreme Court is not bound by the findings of the trier of fact below but is free to evaluate for itself the evidence presented to the Disciplinary Board's Hearing Committee. However, credibility is an issue particularly within the province of the trier who views the testifying witness. *Office of Disciplinary Counsel v. Campbell*, 463 Pa. 472, 345 A.2d 616 (1975), *cert. denied*, 424 U.S. 926 (1975). On matters of credibility, the State Supreme Court will not substitute its judgment for that of a finder of fact when there is sufficient evidence to support his conclusions. *Com. ex rel. Alexander v. Alexander*, 445 Pa. 406, 411, 284, A.2d 721 (1971). Stern failed to apprise the trial court of this legal authority contradicting his theory that the State Supreme Court has a rule or disciplinary scheme permitting substitution of judgment on matters of credibility. And although the Respondents

referred Stern to this decisional law at the trial level, at the appellate level he again ignored this legal authority. When confronted with questioning by the appeals panel, Stern took the position that the State Supreme Court in deciding his case had in fact overruled this law and promulgated new law permitting the alleged substitution of judgment. An examination of the State Supreme Court's opinion does not reveal a declaration of law contrary to the holdings in *Campbell* and *Alexander*.

Indeed, the Respondent has declared that, "It is a basic tenet of our system of jurisprudence that issues of credibility are properly left to the trier of fact for resolution." *Commonwealth v. Whack*, 482 Pa. 137, 140 393 A.2d 417, 419 (1978).

In short, Petitioner is attempting to couch alleged judicial error as, or as akin to, an administrative promulgation of a new general rule. As has been heretofore observed, the State Supreme Court's Opinion reveals no promulgation of a new general rule overruling prior case law. But even accepting arguendo Petitioner's characterization, there is no subject matter jurisdiction, for as the court stated in *Zimmerman v. Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85 (2nd Cir. 1984), *cert. denied*, 467 U.S. 1227 (1984):

> It is possible that a state court could combine in a single opinion an ajudication of a grievance complaint with a promulgation of what amounts to a new rule. Of course, every application of a rule to the facts of a particular case results in some "new" refinement of the rule, and *Feldman* cannot be circumvented by characterizing all of constructions of a rule as promulgation of new rules. Thus, when Zimmerman challenges the . . . decision because it construed the . . . rule's ban . . . he is complaining about a construction of the rule given . . . and *Feldman* limits his challenge . . . to review in the Supreme Court.

Id. at 87.

3. There is no federal subject matter jurisdiction over this matter which seeks or requires review of the final judgment of the highest court in the State entered in a judicial proceeding.

The case of *Dist. Col. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), holds that while a district court has subject matter jurisdiction over general challenges to state attorney disciplinary rules promulgated by state courts in non-judicial proceedings, jurisdiction is lacking when the case requires review of a final state judgment in a particular case. *Feldman*, while relegating constitutional claims that are "inextricably intertwined" with the state's regulation of its attorneys to the state courts, 460 U.S. at 482-83 n.16, continues to allow district courts to exercise jurisdiction over "general challenges to state bar rules promulgated by state courts in non-judicial proceedings, which do not require review to final state-court judgment in a particular case." 460 U.S. at 486.

It is of no moment that the challenge to the state court decision alleges that the state court's action was unconstitutional. *Feldman*, 460 U.S. at 486. The distinction "between general challenges to state bar rules as promulgated and challenges to [what amounts to] state decisions in particular cases . . . is often difficult to draw." *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985); *Rogers v. Supreme Court of Virginia*, 590 F.Supp. 102, 104-108 (E.D. Va. 1984). However, in Stern's case, it is clear on which side of the line the matter falls because the district court was required to review the allegations underlying the state judicial decision in order to address the federal constitutional issues. This evidences the fact that jurisdiction was lacking. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1471-72 (9th Cir. 1985). The rationale for this rule is that state courts are as competent as federal courts to decide

federal constitutional issues. *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (stating that nothing in the legislative history of §1983 supports the argument that a person claiming a federal right should have an unrestricted opportunity to relitigate in federal court issues already decided in state court; state courts have an obligation and ability to uphold federal law); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (rejecting the argument that "state judges will not be faithful to their constitutional responsibilities").

In addition, any other rule would result in a waste of judicial resources and unnecessary friction between state and federal courts. *See Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 286 (1970) (lower federal courts may not sit in review of state court's decisions); *Texaco v. Pennzoil Co.*, 748 F.2d 1133, 1142 (2nd Cir. 1986). The *Razatos* court concluded that claims are "inextricably interwined" if the district court must "scrutinize not only the challenge rule itself, but the [state court's] application of the rule. . . ." If in order to resolve the claim, "the district court would have to go beyond mere review of a state rule as promulgated, to an examination of the rule as applied by the state court to the particular factual circumstances of [the plaintiff's] case," the court lacks jurisdiction. *See also Brown v. Board of Bar Examiners*, 623 F.2d 605, 610 (9th Cir. 1980) (because the plaintiff's complaint and requested relief involved an application of the challenged rule to his particular case, and would require a review of the state court decision, the court concluded it lacked jurisdiction); *Czura v. Supreme Court of South Carolina*, 623 F.Supp. 267, 270 (D.S.C. 1986) (same.) Stern has attempted to circumvent this body of law by couching his cause as a challenge to general rules promulgated in non-judicial proceedings. The Third Circuit Court of Appeals while at first mystified as to what these rules were, gleaned from the record two state court rules which seemed to be the subject matter of Petitioner's

suit: (1) the court-made rule that review of attorney discipline hearings by the State Supreme Court is *de novo* and (2) the Pennsylvania Rule of Disciplinary Enforcement that provides for oral argument but not a second evidentiary hearing before the court. (Petitioner's Appendix: A.15-16). These two rules taken together, the court concluded, allow the State Supreme Court to reject the findings of the Hearing Committee and the Disciplinary Board without affording the attorney an evidentiary hearing before it. The court improperly concluded that this resultant rule was what Stern was purportedly challenging. Instead, Stern was purportedly challenging an alleged substitution of judgment on credibility issues by the State Supreme Court for that of the Hearing Committee; the substitution allegedly taking place in the judicial decision making process. As has been observed elsewhere in this Brief, such a substitution did not occur. And there is no rule or scheme which would allow it to occur. Such a substitution would be in contravention of jurisprudential policy as declared by the Respondent Court, and were it to occur, it would be judicial error.

In the final analysis, the district court was required to review the state court judicial decision and not a rule and the appeals court was correct in concluding that there was "inextricable intertwining" of the challenge and the final state court judgment.

As Justice Marshall stated in his concurring opinion in *Pennzoil v. Texaco, Inc.*, 481 U.S. _____, 95 L.Ed.2d 1, 109 S.Ct. 1519 (1987).

> [I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal court claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal

proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Id. 95 L.Ed.2d at 25.

The Fifth Circuit Court of Appeals has observed that alleged errors committed by state judges in state court are for correction in the state court system (and inevitably by the United States Supreme Court). *Brinkman v. Johnston*, 793 F.2d 111 (5th Cir. 1986). Stern waived his appellate rights and he is simply attempting to circumvent his waiver by circumventing the *Feldman* doctrine with a nominally facial challenge in fact seeking review of a particular state court determination. *See Reed v. Terrell*, 759 F.2d 472 (5th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) *Zimmerman v. Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85 (2nd Cir. 1984), *cert. denied*, 467 U.S. 1227 (1984); *Randolph v. Lipscher*, 641 F.Supp. 767 (D.N.J. 1986) *Rosquist v. Jarrat Construction Corp.*, 570 F.Supp. 1206 (D.N.J. 1983).

4. As a matter of law, the Supreme Court's procedures are lawful.

In the case of *Razatos v. Colorado Supreme Court*, 746 F.2d 1429 (10th Cir. 1984), an attorney suspended from practice by the Colorado Supreme Court brought a §1983 action seeking a declaratory judgment that the Colorado procedure for disciplining attorneys violated the Due Process Clause of the Fourteenth Amendment and a hearing clearing his name. (This is in sharp contrast to Stern who requested that the State Supreme Court be permanently enjoined from disbarring him). The *Razatos* plaintiff asserted that under the Colorado attorney disciplinary scheme the Colorado Supreme Court makes the final fact determination as to whether an attorney should be disciplined. He argued that this scheme violates the Fourteenth Amendment because due process requires that a personal hearing be held before a final decision maker. Razatos claimed that if the

Colorado Supreme Court has the discretionary power to hold de novo hearings, its failure to provide one when issues of credibility are crucial violates an accused attorney's right to have the final decision maker actually hear the challenged testimony. The Tenth Circuit Court of Appeals analyzed the claim in light of the holding of *United States v. Raddatz*, 447 U.S. 667 (1980), in concluding that Razato's rights were not violated. Stern does not take a position on whether the Supreme Court may or may not conduct hearings when appropriate however, the State Supreme Court's authority under the Pennsylvania Constitution is plenary as is the authority of the Colorado Supreme Court's. Pennsylvania Rule of Disciplinary Enforcement 103. Said the *Razatos* court, "We hold . . . that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the Supreme Court to instances when it should exercise its discretion to conduct a de novo hearing and view the witnesses itself." No less can be said of Pennsylvania's procedures which are identical.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Howland W. Abramson, Esquire
1515 Market Street
Suite 1414
Philadelphia, PA 19102
(215) 560-6321
Attorney for Respondents

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the United States Supreme Court.

Howland W. Abramson, Esquire